ETHICS

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The Uniform Rules of Ethics

- These are the rules of ethics of the General Council of the Bar

Rule / Issue	Details	Notes/Cases/Rulings
INTRODUCTION **Rule 1.2**	**Rulings of Bar Council** In case of any dispute on interpretation of any of the Rules, the interpretation by the Bar Council is binding on members. Where doubt as to proper course of conduct, counsel obliged to obtain ruling from Bar Council or advice from member of Council or senior member.	
Rule 1.3	**Duty of counsel to know bar rules** It is the ***duty of all members to know the Rules***. New members should introduce themselves to all members of the bar, use last name only.	
Rule 1.4	**Appearance in other Divisions** Counsel appearing in Division where he does not usually practice must ***observe rules and etiquette of both own and guest division*** In case of *conflict* between such Rules, counsel must ***comply with Rules of own Division***	
Rule 1.5	**Misconduct** With regard to misconduct *other than of a professional nature*, duty of counsel is ***no higher than that ordinary citizen*** <u>Johannesburg Bar Rule</u> - It is ***not the function of Bar Council to consider private affairs*** of members in absence of allegation of unprofessional / improper conduct - If creditor alleges member has failed to honour commercial commitments, creditor must take appropriate steps to recover money	**<u>General misconduct</u>** • ***Balieraad v Burger*** • ***Society of Advocates v Z*** • ***GCB v Matthys*** - Charged with: ▪ lying to and/or misleading courts and/or presiding officers; ▪ failing to comply with the duty owed to a client to prepare properly and fully for the presentation of the client's case and to act in the best interests of the client; ▪ failing to appear on various dates before a presiding officer, either at all or timeously, in a criminal matter ▪ failing to appear before a regional court on dates to which matters in which he was appearing had been postponed;

		▪ accepting clashing briefs; ▪ failing to return a deposit paid by a client after the termination of the mandate and non-performance of the services in respect of which the deposit paid ▪ accepting instructions from a member of the public without the intervention of an attorney. - It was permissible to have regard to the ***totality of the respondent's conduct*** and the ***cumulative effect*** thereof in arriving at a decision. **<u>Rulings</u>** - Unprofessional misconduct ***includes***: ▪ Telling client in presence of attorney to *seek other attorney* ▪ *Slapping reporter* during adjournment ▪ *Failure to appear in court on traffic summons* ▪ *Joke threatening safety of counsel and family* ▪ Discussions with party while arbitrator – suspension for 6 months (suspended) - Does ***not*** include: ▪ Being rude to attorney in lift <u>not</u> *prima facie* unprofessional conduct Note – internal disciplinary hearing – no duty to furnish complainant with response of member accused
Rule 1.6	**Reporting Misconduct to Bar Council** If counsel has *reasonable grounds* for believing another counsel has been guilty of *unprofessional conduct*, he has the ***duty to report the matter*** to his own Bar Council; <u>unless</u> the matter is privileged and privilege not waived.	
Rule 1.7	**Seniority** Senior counsel = counsel holding Letters Patent from HM The Queen or the State President. Seniority is ranked by date of Letter Patent. All other counsel are junior counsel.	

	Junior counsel seniority reckoned by date of admission or re-admission as advocate (with antedating for period already admitted). Seniority may be waived by any member in any proceedings provided that no Senior Counsel may waive his seniority to a Junior Counsel.	
Rule 1.8	**Application for Silk** Junior counsel may apply for silk only after obtaining consent required by his bar or bar council and must observe its procedure.	Johannesburg Bar rule - Silk applications considered once a year - Must apply in writing to Chair of Bar Council - May allow members more senior to most junior applicant to apply after cut-off - Chair may reject application as unsuitable - Goes to Silks Committee of Bar Council - Committee decides who to recommend; criteria is determined by full Council - Chairman notifies Judge President of who the Bar Council recommends for silk
DUTIES OF COUNSEL IN CONNECTION WITH BRIEFS **Rule 2.1**	**Duty to accept Briefs** Counsel is under ***obligation to accept brief in courts which he professes to practice at a proper professional fee*** unless ***special circumstances justify his refusal*** to accept a particular brief. In particular, every person charged has right to services of counsel in presenting defence – it is therefore ***duty of every advocate to undertake defence of accused person who needs services***. Counsel ***may decline specialist brief if he considers himself not competent*** to accept brief.	Rulings - Special circumstances allowing decline of brief are ***not***: ▪ Brief from MP re. defamation where counsel *disagreed with MP's political views* - Special circumstances allowing decline of brief ***are***: ▪ Refusing to accept brief with member of bar who considers people should be excluded from Bar on grounds of race, colour, religion ▪ Appropriate to refuse to act *pro amici* but nevertheless to sign pleadings - Failing to attend to brief over many months despite demand is unprofessional - Member *entitled* to retain a brief on trial in a matter in which he had three years previously, in his capacity as

		articled clerk, replied to the letter of demand. The brief was to represent the same side whom he'd represented in writing as an articled clerk and it was clear that the brief to him was not influenced by the fact that he had been involved at an earlier stage
Rule 2.2	**Precedence of Briefs** Subject to Rules on appeals, ***earlier brief once accepted takes precedence*** over later brief should conflict arise in performance of briefs. Member wishing to ***surrender earlier brief for later brief may do so only with consent of both attorneys***.	Ruling - Where later *more lucrative brief, unprofessional and misleading* simply to inform Legal Aid Board that unable to attend to brief due to unforeseen circumstances - Member was severely reprimanded.
Rule 2.3	**Obligations regarding appeals** If member briefed in trial, this constitutes a ***retainer*** – means party ***entitled to services of counsel on appeal*** provided he exercises this right within reasonable time. Where member ***briefed in trial on same day as appeal*** – the ***appeal takes precedence unless chair of Bar approves otherwise***.	Ruling: - Although appeal is to take precedence over trial, where counsel *had been briefed for trial and appeal on same day and for which trial preparation had already been made, It was ruled that he should not be compelled to give up the trial in view of the possible prejudice to his client* - The Rule does ***not*** mean that counsel has a *right to be briefed on appeal where he has been briefed on trial*.
Rule 2.4	**Attending to briefs personally** Counsel must give ***personal attention*** to all briefs – improper to hand on brief to anyone else, except on instructions of attorney.	
Rule 2.5	**Holdings briefs for other counsel** Improper to hold briefs for other counsel except in case of *illness* or *intervention of unforeseen and unavoidable contingencies* causing absence ***sine lucri causa*** or other reason good and sufficient in opinion of Bar Absence on bar business is good and sufficient reason.	Ruling - *Lucri causa* ▪ *Engaging in work in court*, *chambers* preparing for non-*pro deo* matter or *remaining in chambers and available to accept briefs* ▪ Parliamentary duties – but Bar council may waive ▪ When composite fee charged, on appeal or criminal trial, counsel is deemed to be engaged *lucri causa* throughout the hearing of the appeal or trial

		- *Sine lucri causa*
		  ▪ Provincial Council duties
		  ▪ *Pro deo*/LAB/*pro amico* work
		  ▪ Holiday
		  ▪ Defence force
		  ▪ Assessors
		  ▪ Chairman of Commission of enquiry
		  ▪ prosecuting
		- May not have brief held when able to take brief but declines to do so for personal reasons
		- Sharing of fees may be allowed with member away *non*/*sine lucri causa* if ***special circumstances to permit*** it (only Senior-Senior or Junior-Junior)
		- Where brief to be held must get permission of instructing attorney and must give it the same attention as own brief

Rule 2.6	**When to refuse or give up a brief** It is ***improper*** for counsel to accept unconditionally or retain brief where he should reasonably foresee: - ***Not being able to attend to brief within a reasonable time***; or - Would have to ***surrender*** brief for any reason <u>and</u> *surrender could cause inconvenience / embarrassment / prejudice to client / colleague succeeding him in brief / instructing attorney*.	<u>Ruling</u> - Must be ***alive to possibility of trial spilling over*** and if so, must ***ask the judge personally if he intends sitting on the day in which there is a conflict and must pass on the other brief at the stage when it appears that the trial will run over***. - ***Cannot*** accept brief in motion court for ***Pretoria and JHB in same week = double briefing*** - ***Must know length of motion court roll***, i.e. if it is to be a continuous roll, running from Tuesday to Friday, should not take a brief to appear in another matter on the Thursday. In the absence of a contrary indication, an advocate's mandate to represent a criminal client *ends upon the discharge of that client*.
Rule 2.7	**Counsel's involvement in costs** Counsel may ***not*** draw bill of costs for attorney, but may give opinion on any matter arising from bill of costs, draw submissions in a taxation dispute or appear before a taxing master.	

Rule 2.8	**Settling a matter** ***Not improper*** to accept brief to settle a matter as opposed to brief on trial.	
Rule 2.9	**Providing signed pleading** Not improper for counsel to provide a duly signed pleading drafted by him to his instructing attorney.	
DUTIES OF COUNSEL IN CONNECTION WITH LITIGATION **Rule 3.1**	**Duty to client** According to Bar's best traditions, counsel must act with all due ***courtesy*** to tribunal but ***must fearlessly uphold the interests of client without regard to any unpleasant consequences for counsel or other person***. Counsel has same privilege as his client of asserting and defending client's rights and protecting his liberty or life by ➢ ***free and unfettered statement of every fact***, and ➢ ***use of every argument and observation*** that can ***legitimately*** achieve this end. Any attempt to restrict privilege should be jealously watched.	Ruling: - Counsel discovered client had tapped telephone of opponent and overheard attorney-client conversation. Held ***client had to decide whether to permit counsel to disclose to other side or withdraw brief*** ▪ Once withdrawn – ***no duty to disclose*** matter to other side ▪ But if ***remained on brief, there would be a duty to disclose to other side***. ▪ Member could ***not*** continue to act in the matter and not inform the other side what he had learnt. - Member ceased to act for a client with permission of attorney. Member wrote letter to attorney thereafter. Client asked member to divulge contents of letter to him. Council ruled that in general, ***member entitled to disclose letter to erstwhile client***. - Where came into possession of other side's opinion – depends whether it would be permissible in law for the member to have regard to it. If not legally entitled to have regard to it, then = improper conduct. - ***Can represent insurer against former client*** (who was the *accused in a criminal trial arising out of the collision*) in civil trial. - Where representing *many accused and withdraw due to conflicts*, ***can represent one accused if only his trial proceeds in absence of others*** - Member during trial aware of fraud by police – granted permission to do affidavit on the matter for purposes of the fraud charge brought against police. - Where member argued point of law in

		front of judge, week later had to argue opposite point of law at last minute in front of same judge, different matter, while judgment on former matter was reserved. Initial ruling: ▪ Member ***must make full disclosure to second client and give him the option of briefing someone else***. ▪ Member should seek to ***avoid embarrassment by postponement or substitution if that could be done without prejudice to anyone*** ▪ If the issue could not be avoided and client required her to do so, she ***should*** argue the point. ➢ Bar Council's subsequent view: ***Member should have withdrawn in second matter***. ***First client's interests precedence over second client's interests***. - Where counsel knows of client unfitness to own firearm – ought not to disclose to police (because covered by privilege) unless likely that crime will be committed. - Provisional sequestration. Despite counsel's efforts, provisional sequestration order was granted against client. Counsel was then fired and the client appeared on his own on the return date and the provisional order was disposed of. Complaint against counsel that he had handled the matter ineptly was dismissed on the basis that had the judge who presided at the return day been the same one as on the first occasion, the order would not have been granted. Counsel was not to blame.
Rule 3.2	**Duty to court** Counsel's duty to divulge material facts of which he has knowledge to court is governed by: - His ***overriding duty not to mislead the court***	<u>Rulings:</u> - Ex parte – where counsel aware of facts = necessary to disclose – had to ask for ***permission to disclose or return brief*** - Where plaintiff died before trial –

	- His duty ***not to disclose*** to any person, including in a proper case the court, any *information confided to him as counsel.* Application of this principle and the question of whether counsel may be said to have knowledge is difficult to resolve and in such cases counsel should refer to Bar Council for guidance.	must disclose this fact in settlement negotiations as counsel now acting for executor, not plaintiff - Communication by client of facts leading to conclusion that crime is to be committed is ***neither confidential nor privileged and counsel may disclose to authorities sufficient info to prevent occurring***. ▪ Whether positive duty depends on facts of case - Failure to disclose information to judge that attorney is involved in another case. On the facts, shown that counsel did not know that the attorney was so involved and therefore did not act unprofessionally. - ***Member informing court of without prejudice offer = guilty of unprofessional conduct*** - Entitled to attack witness credibility in argument with reference to evidence given subsequent to witness' cross examination without putting that putting that evidence to him if counsel didn't know at time of cross-examining the witness that such evidence would subsequently be given - Where witness indicated to counsel that a statement he had made under cross-examination had been incorrect, and it was envisaged that witness would testify again at a later stage, two possibilities arose: ▪ At re-commencement of evidence, witness could withdraw his earlier evidence, in which case counsel could continue acting OR ▪ If witness refused to set the matter straight when recalled, then counsel would have to withdraw as they could not continue to act knowing that material recorded evidence was incorrect. **<u>Cases – duty not to mislead the court:</u>**

		- ***Ex Parte Swain (N)***
		  ▪ Affirmed in ***Swain v Society of Advocates (AD)***
		 - ***S v Hollenbach***
		 - ***Society of Advocates v Merret***
		 <u>Cases – duty to disclose material facts in ex parte applications</u>
		 - ***Logie v Priest***
		  ▪ ***Cannot be too strongly insisted*** that in ex parte applications it is ***duty of applicant to lay all relevant facts before the court*** – so that it may have full knowledge of circumstances of case before making its order
		 - ***Power v Bieber***
		  ▪ ***Utmost good faith must be observed*** by litigants making ex parte applications in placing material facts before the court
		  ▪ Where material facts kept back, wilfully or *mala fide* or negligently, court has discretion to set aside order
		  ▪ Must not use ex parte to establish ***tactical advantage***
		 - ***Ex parte Satbel***
		  ▪ Counsel's ***duty to draw to the judge's attention any deviations from the standard forms and orders i***n the papers and to explain such deviation.
		 - ***Ex Parte Hay Management Consultants***
		  ▪ Counsel ***must keep up to date with recent authority***
		  ▪ Judge in motion court relies on counsel – especially in ex parte applications – to ***inform of cases which may prevent order sought***
		 - ***Toto v Special Investigating Unit***
		  ▪ Duty of litigating party to inform court of any judgment material issues of which he is aware
		  ▪ Representative not mere agent for client – duty to judiciary to

		ensure efficient and fair administration of justice ▪ Must inform about judgment that goes against arguments – failure to bring such judgment to attention is gross dereliction of duty ▪ ***Not for counsel to decide matter is distinguishable – must bring to court's attention and argue it is distinguishable***.
Rule 3.3	**Duties regarding Cross-examination of witnesses** Questions ***affecting credibility of witness by attacking character***, which is ***not otherwise relevant*** to actual enquiry, ought ***not*** to be asked unless counsel has ***reasonable grounds for thinking imputation conveyed by question is well-founded or true***. Where counsel is instructed by his attorney that *in attorney's opinion the imputation is well-founded or true* (not merely instructed to put) – entitled to *prima facie* regard this as reasonable grounds. Should not accept as conclusive the statement of any person other than attorney that the imputation is well-founded or true *without ascertaining that such person can give satisfactory reasons for this statement*. Such questions, even if well-founded, should ***only be put if it's counsel's opinion that they would / might materially affect credibility of witness***. If imputation conveyed by question is so remote in time or such that it would not affect credibility, then should not be put. In all cases – ***duty of advocate to guard against being made channel for questions which are only intended to insult or annoy witness / other person*** – must exercise own judgment as to substance and form of question put.	Ruling: - Member must not act on behalf of accused where he would have to ***cross-examine state witness who he had consulted in civil trial in which disclosures made that were relevant to criminal trial*** **Cases** - ***S v Radebe*** ▪ Where accused's counsel ***knows from accused that witness statement must be true – cannot suggest to witness that evidence not true.*** - ***S v Azov*** ▪ Before attack must at least lay basis to satisfaction of judge that you have grounds for attacking witness - ***S v Booi*** ▪ Function of prosecutor to conduct himself with restraint and due regard to rights and dignity of accused persons ▪ Cross-examination must be as ***full and effective as possible***, but unbecoming that legal rep (esp prosecutor) subjects witness (esp accused) to ***harassing and badgering cross-examination***. - ***S v Makaula*** ▪ Injunction in ***Booi*** is still more serious when presiding officer follows suit. - ***S v W***

		▪ Assertions advanced by a party's attorney in cross examination (specifically and deliberately made), may be regarded as admissions, by that party, of the matters so asserted. - ***S v Xoswa*** ▪ Where *state intends to discredit evidence of accused*, should ***cross-examine to that end in order to enable accused to meet state's attack***. - ***S v Kubeka*** ▪ Perfectly permissible to test a witness's version by ***ascertaining details and then interrogating him about them*** ▪ <u>But</u> should not couch questions so that they ***appear as statements of fact to which others will depose when in truth facts are not part of one's case and no evidence will be led on them*** - ***S v Omar*** ▪ Conduct of prosecutor in being rude, hectoring, unreasonable, derogatory comments – handicaps witness and precluded him doing justice to himself – this is unfair. - ***S v Gidi*** ▪ Must not ***direct torrent of words and then ask question at end***. ▪ Must not *express personal sentiments*. ▪ Must ***reserve adverse comment on evidence of accused for his closing argument***.
Rule 3.4	**Imputations of Criminal Conduct** Counsel ***not entitled wantonly or recklessly to attribute to another person the crime with which client is charged***. May also ***not*** do so *unless facts or circumstances given in evidence and inferences to be drawn from them suggest at least a not unreasonable suspicion that that*	

	the crime may have been committed by the person to whom guilt is so imputed.	
Rule 3.5	**Professional vs. personal interest** Counsel must not become ***personally*** (as opposed to professionally) associated with client's interest. Counsel should not, for instance, stand bail for client nor take part in public movement for his reprieve.	Ruling: - Counsel **should refuse to handle money for client** - Generally member involved in case must *not sign petition for mitigation of sentence of offender*. For other members, it is a matter of individual discretion. - ***Undesirable for member to act on behalf of close relative*** as difficult to maintain objectivity required as officer of court.
Rule 3.6	**Postponements** Where counsel holds brief to appear on particular date, improper for him to ***seek or arrange postponement to suit his convenience***, unless: - Has ***disclosed in full reasons to attorney***, attorney has consented and has made clear that ***client has agreed to postponement***; and - Has ***disclosed reasons to lawyers of other parties*** involved in matter.	
Rule 3.7	**Attendance of attorney with counsel in court** Counsel shall ***not*** appear in CC, SCA, HC or Labour Court without the attendance of a representative of his briefing attorney (can include articled clerk who is able to communicate telephonically with briefing attorney). Same rule applies for inferior courts and lay tribunals ***unless the matter is of such a nature as not to warrant fees for the attendance of more than one practitioner***. Provided, *attorney can be contacted on phone and counsel will not settle matter or take another decision requiring instructions without communicating with the attorney*.	
GENERAL PROFESSIONAL CONDUCT **Rule 4.1**	**Interviewing clients and witnesses** Save for exceptional circumstances / pro deo defence / dock defence – clients and witnesses should ***not be interviewed except in presence of attorney***. Consultations should ordinarily be held in	Ruling: - Mere fact that counsel briefed by out of town attorney does ***not*** constitute *exceptional circumstances allowing consultations without attorney*.

	chambers or ***counsel's home***. Consultations ***may*** be held in attorneys' office if: - Situated *in centre other than where counsel practices; or* - *Bulk of documents, number of people involved, or other special circumstances make consultation elsewhere impracticable* – ***prior consent of bar council member must be obtained.*** <u>Johannesburg Bar Rule:</u> - Counsel are independent practitioners of advocacy - Practice of advocacy is a ***referral profession***; accordingly, counsel do ***not solicit mandates and <u>only</u> accept mandates from admitted attorneys***. - Counsel ***must hold chambers at places approved by Bar Council, from which they conduct their practices*** - Must generally consult with attorneys, clients, witnesses etc ***at chambers*** - Where circumstances arise which ***reasonably indicate that cannot consult conveniently at chambers***, counsel may direct that consultation be held at other appropriate place (incl. attorney's offices) – ***provided that counsel do not compromise independent status***.	- Pre-trial should ***<u>not</u>*** be held in attorney's office, if can't be held in member's chambers must be held on ***neutral territory such a room in High Court or at chambers of another silk at the Bar*** (because the other side's counsel was a silk) who would extend the courtesy. - Permission allowed to attend attorney's office for the purposes of keeping a watching brief on behalf of a client at a meeting of the attorney's fidelity fund. - Permission allowed (on exceptional basis) for counsel to consult overseas with witnesses without attorney. - Not appropriate to consult without the presence of an instructing attorney and communicating directly with the litigant on the other side.
Rule 4.2	**Interviews after witnesses sworn** ***Undesirable to interview any witness after he has been sworn***. ***Improper*** for counsel to interview witness who is ***under cross-examination*** unless circumstances make such interview necessary. ***Improper*** to interview witness between cross-exam and re-examination. Where circumstances make it necessary to	<u>Ruling:</u> - Proper conduct to consult with witness under cross-ex where cross-ex has produced amendment and therefore ***entirely new issue*** (i.e. *could not reasonably have been anticipated at the time that counsel initially consulted with the witness*) – but ***inform opponent first***. - Not unethical to place on record allegation from witness that opposing

	interview witness during cross ex or between cross-ex and re-examination: - ***Ask opponent*** first; - If he refuses, ***ask court***.	attorney spoke to the witness during cross-ex requesting that he change his evidence, but must guard against speaking to a witness whilst still under cross-examination and, furthermore, comity between members of the profession requires that you *ought to warn opposing counsel first of intention to make such disclosure to the court*. -
Rule 4.3.1	**Interviewing persons likely to be opponent's witnesses – *civil*** A litigant's legal representatives are ***entitled at any time to interview persons who they have reason to believe are in possession of relevant information to case***. ***Cannot*** be deprived of this right merely because *other side has subpoenaed person, has interviewed person or has taken statement from person*. ***Only limitations*** to this right are as follows: - 1) Where one of these steps taken by other side and *litigation commenced* and *person not yet testified* ▪ May ***not*** interview / continue interview with them ▪ Unless other side ***timeously notified*** of intention (but other side ***not entitled to attend or object***) ▪ If party reasonably suspect that one of above steps taken, *must ascertain whether it has been taken*. - 2) Where person ***has testified*** for other side *but litigation not finally been determined*: ▪ May ***not*** be interviewed ***without other side's legal representative present*** ▪ Unless they (having been timeously notified) decline to attend. - Where other side objects to questioning in (a) and (b) – does ***not*** preclude the litigant's legal representative from proceeding with	Ruling: ➢ Where witness says to opposing side that he would be prepared to talk to them and would give evidence favourable to them ▪ Held was *entitled to consult subject to normal rule of notice to the opposing side* ▪ If counsel did not consult the witness, no duty to tell other side that witness likely to testify in favour of his side

	it.	
Rule 4.3.2	**Interviewing persons likely to be opponent's witnesses – *criminal*** Counsel for accused ***may <u>not</u> interview person who they know to be witness for prosecution after arrest or charge but before conclusion of case*** - Unless ***permission from DPP*** or prosecutor and comply with conditions If permission refused, accused counsel entitled to interview state witness if ***authorised by competent court*** – subject to conditions of that court. When circumstances such that accused's counsel should reasonably suspect that person may be prosecution witness, *under duty to ascertain from witness / prosecutor / police whether he is witness – before interviewing witness*. A witness for the prosecution is: - Person from whom the police / prosecutor obtained statement in connection with charge – whether before or after arrest - Person having been called to testify during trial by prosecution - ***<u>Not</u>*** someone prosecution decided not to call to testify at trial (even if statement obtained). Duty of prosecutor to ***give accused's counsel access to statements of witnesses*** (whether to be called or not) and ***contents of police docket necessary for accused person to properly exercise right to fair trial*** - But ***not*** where reasonable risk of *disclosure of identity of informer / state secrets* - Also ***not*** where might lead to *intimidation of witnesses or prejudice proper ends of justice* - Above exceptions apply unless order by court. When no prior disclosure of witness	<u>Ruling:</u> Improper for a member after accused was convicted but before sentence to consult with the complainant about whether he would support a suspended sentence for the accused; the member should have asked the prosecution for permission to consult the witness. **Interviewing witnesses for the prosecution** • ***Shabalala v Attorney-General***

	statements, it's duty of prosecutor: - Must notify defence when decide not to call witness at trial from whom a statement had been obtained and to supply copies of statements from such persons ▪ May exclude statements where disclosure protected by legal privilege – but must inform accused counsel ▪ Must also inform counsel of any statements previously in his possession and reason no longer in possession. - Where witness testifying and departs materially from contents of statement, must notify defence immediately and supply statement.	
Rule 4.4	**Affidavits from witnesses** Must ***not*** ordinarily get affidavits from prospective witnesses except in cases where their evidence is ***intended to be presented by means of the production of those affidavits***.	The reason for this rule is that fear of prosecution for perjury may lead witnesses to ***stand by their incomplete or incorrect statements in the affidavit in viva voce evidence***, to the detriment of the proper administration of justice.
Rule 4.5	**Counsel giving evidence or making affidavits** Counsel must ***avoid*** putting himself in position where he may have to ***make statements or give evidence in relation to matters in dispute in cases in which he was appearing***. Counsel must always ***seek permission of Bar Council before making affidavit or giving evidence*** concerning matter which became known to him while acting in his professional capacity,	Ruling: - Where matter arose over whether counsel forced settlement – ruled that correct procedure was to reply from Bar, not affidavit - Where counsel for accused was the ***only witness to magistrate's irregularity*** – he *could make affidavit* in a review application. - Where counsel evidence required for action against instructing attorney, could make affidavit after permission - **Permission always needed** – many examples where necessary and permission given - Member had conversation re political murder but gave undertaking of confidentiality – subpoenaed re that evidence: ▪ *Bound by undertaking re*

		confidentiality unless he was under legal compulsion to testify ▪ Should ***not*** rely on Bar Bouncil for a view on the legal issue ▪ If subpoenaed and would give evidence – must notify relative so he could take any action available to prevent the member having to give the evidence - Member granted permission to depose to an affidavit in circumstances in the MC where he had closed the defendant's case without leading evidence but later wanted to reopen the case, in order to give magistrate the reasons for not having led the evidence previously. - ***Judge requiring affidavit***. Ruled counsel should make affidavit but ***advise the judge that counsel did not usually make affidavits and an unsworn statement by counsel should usually be accepted without question***. - Permission refused where found that an attorney or senior member of the law society could give the same evidence. - Permission granted to give affidavit to provide evidence to the police of an alleged fraud.
Rule 4.6	**Evolving schemes for clients to evade provisions of the law** Counsel is ***entitled to advise client on whether proposed conduct would violate law***. Entitled to advise a course of conduct which will ***so order affairs of client to avoid liability under taxing or similar statutory provisions***. ***Not entitled to devise scheme which involves client in commission of offence***.	
Rule 4.7	**Gifts from clients** ***Not improper*** for counsel to accept from a client a gift of money or gift of substantial value as *additional fee or reward for services rendered*. Provided that gift ***received through attorney*** and that ***gift and circumstances are notified to Bar Council***.	

	Bar Council may in its discretion ***disallow part or all of gift if it considers that size, nature or circumstances under which given warrant disallowance***. Permissible to receive gifts of personal nature from client without notice to Bar Council but all honorariums must be reported.	
Rule 4.8	**Company meetings** If counsel briefed to make representations or speak on behalf of client, e.g. at company meeting: - Should disclose that he is appearing as counsel, even if entitled to appear in own right.	
Rule 4.9	**Duty to remain in court** Counsel should remain in court ***after completion of his matter until counsel in next matter has risen***.	***Penultimate counsel should remain in court until last counsel has addressed the court***.
Rule 4.10	**Interviewing judicial officer** It is undesirable, save for special circumstances, for counsel in a contested case to seek to interview the judicial officer who is hearing or about to hear case, without opposing counsel or his consent.	
Rule 4.11	**Where criminal accused informs counsel he is guilty** Rule applies when ***client makes confession before or during criminal proceedings***. Counsel must explain to client the basis on which he may continue with case: - May ***not*** assert that which is knows is ***untrue or attempt to substantiate a fraud or untruth*** - ***May*** argue that evidence offered by prosecution is *insufficient to support conviction and may take advantage of any legal matter which might relieve criminal liability* - May ***not*** set up ***affirmative case which he knows to be inconsistent with confession*** Client must then decide whether to accept these conditions or require counsel to give up	

	the brief.	
Rule 4.12	**Ill-feeling and personalities between counsel** Clients, ***not counsel***, are the litigants. Therefore, ***ill-feeling between clients not to influence counsel's conduct or demeanour to each other***. "Personalities" between counsel and "personal colloquies" which cause delay and promote unseemly wrangling should be scrupulously avoided. Improper to allude to personal history or personal peculiarities or idiosyncrasies of counsel on other side.	Ruling: - *Improper to become involved in argument with A-G's staff in public and raise voice* - Where counsel *damage group property – must apologise to leader asap and tender to pay damage*
Rule 4.13	**Further material placed before court after judgment reserved** Improper to attempt to place any further material of whatever nature *before court after judgment reserved without consent of other party*. Such consent *not to be withheld unreasonably* – particularly where request is to give references to authorities that will assist court. Where consent is ***refused***, proper course is to ***request court*** to receive material through registrar or even apply to re-open case.	Ruling: - Duty of member to make available a ***copy of relevant unreported judgment to opponent asap***
Rule 4.14	**Appearances in court** When appearing, counsel must wear clothes suitable to be worn under gown and in court. Arrange with judge's registrar to be introduced to judge / magistrate before first appearance before them. Front row for senior members, back rows for new members.	Ruling - Unprofessional to leave *insufficient time between return from holiday and required attendance in court* because planes can be delayed. - Misconduct to accept pro deo matter when unable to perform - Misconduct to accept "passed on" matter when not available for court until mid-morning
Rule 4.15	**Other callings while at the Bar** Member ***may*** engage directly or indirectly in any occupation unless: ➢ Association with that occupation ***adversely affects the reputation of Bar***; or ➢ Such engagement ***prejudices ability to attend properly to clients***.	Ruling: - ***Acceptable*** ▪ Part-time secretary at charitable org ▪ Temporary director of LAB ▪ Member of Board of Directors ▪ Trustee ▪ Translator ▪ Temporary return to magistrate

	Being a part-time lecturer ok, but ***full-time teaching post incompatible with active practice*** except where *exemption granted by GCB in respect of Associate Members*. Johannesburg Bar Rule: - Members may accept full-time or part-time employment at a law centre ***approved by Bar Council***. - Member has *all rights and responsibilities of member* - Member ***must be briefed by attorney at law centre*** to appear in any court or tribunal – for each matter - Member with ***part-time employment must notify Bar Council*** of terms of appointment and ***may receive no reward for that employment other than remuneration as set out in notice to Bar Council***. - Remuneration of member in full-time employment of law centre *only by way of salary from Law Centre* and money from arbitrating. ***NO FEE FROM LAY CLIENT PERMITTED***. - ***Not bound or permitted to accept brief from other attorney without Bar Council permission*** - Must ***not*** do attorney's work, but may do correspondence. Johannesburg Bar Rule: The Bar Council may in its discretion permit ***holders of university academic posts to be members of the Johannesburg Bar*** on such terms as to *pupillage, chambers and subscriptions as the Bar Council may decide in each case*.	▪ Executor testamentary ▪ Accept shares and give legal advice in return – provided not in-house counsel and provided separate attorneys and advocates briefed - ***Not acceptable*** ▪ Member of Industrial council – because representative of Manufacturers Assoc ▪ Co-trustee in insolvent estate ▪ Member of law clinic if wanting to continue to accept briefs as member of the Law Society ▪ Ad hoc deputy sheriff
Rule 4.16	**No partnerships** • No relation in least degree resembling partnerships in practice is permissible.	Ruling: • Ruling - Will ***not*** approve member being *partner of attorney anywhere in world* - Permission to employ ***PA/Legal researcher denied***.
Rule 4.17	**Advertising** Counsel ***may*** advertise.	Ruling: • Business cards ***acceptable*** – name, title

	Advertisement must be factually true and not of a kind that might be reasonably be regarded as: ➢ *False, misleading, deceptive* ➢ In contravention of legislation ➢ ***Vulgar***, ***sensational*** or otherwise as to bring court, colleague or legal profession into ***disrepute or ridicule***. Counsel may on basis of specialised qualification or experience and with Bar Council approval advertise himself as specialist or offering specialist services.	as advocate, academic qualifications, status as SC • Bar generally welcomes participation of members in lectures etc.
Rule 4.18	**Publications by counsel** Counsel should ***not*** write articles in *non-legal publications about cases pending or cases where time for appeal not expired*. Contrary to professional etiquette for counsel to engage in *newspaper correspondence or issue press statements on subject of cases in which they are / were involved as counsel*. ***Undesirable for counsel to express opinion in press on any matter pending in Courts*** – but ***may do so, in general terms, where not pre-judging result***.	
Rule 4.19-21	**Statements to Media** May ***not*** issue statements to media in connection with any matter in which he has been briefed or instructed.	
Rule 4.22	**Classified directories** [Deleted in 2008.] <u>Johannesburg Bar Rule</u> ➢ Information made available to public re. ***members or groups*** must be: ▪ Accurate and objective ▪ Not harm or diminish standing or reputation of Bar, Bench, profession ▪ ***Not make comparisons direct or indirect with other members or groups*** ▪ ***Not include statements about quality of work, size or success of practice or***	

	success rate ▪ ***No puffery or branding, suggesting that group has particular corporate identity or profile, better resourced, has more distinguished history or composed of more able members*** ▪ May disclose member's name, where holding chambers, qualifications and specialties if any ▪ May disclose location, members' names ▪ May be on business card or brochure. ▪ A member shall not in relation to practice use any title other than "advocate"	
Rule 4.23	**Publication and discussion of Bar matters** Proceedings of bar meetings are strictly private and confidential and should not be communicated to press unless Bar Council or Society specially indicates that communication should be made. Publishing of list of office holders is permissible. Discussion with outside persons of any matter concerning professional work at Bar and its members must be conducted with greatest discretion. Many such matters are of confidential nature.	
Rule 4.24	**Complaints regarding attorneys** Counsel desiring to complain to Law Society about attorney's conduct must do so only through Bar Council. - Matter must then be left in hands of Law Society and Bar Council.	
Rule 4.25	**Judicial appointments** It is unprofessional conduct for a member who acted as a judge to ***delay the delivery of a judgment unreasonably***. (Timing is from completion of the relevant court proceedings.)	
Rule 4.26	**Devilling** It is essential that advocates retain their	

	professional independence. Any system of payment which *converts a devil's services into employment is undesirable*. Although not improper for member requesting services to show appreciation in tangible form, ***any form of payment which obliges the devil to do the work is undesirable***. ***Devil takes no part in consultations or conduct of case at court*** *save with the attorney's consent*; although it is not unethical to disclose to the attorney that a devil is or will be used, it is *not within etiquette that the use of a devil be imposed on an attorney*.	
Rule 4.27	**Robing** Counsel should robe before CC, SCA, HC, Water Court, Income Tax Court, Court of Commission of Patents, Competition Appeal Court, LCC, LC, LAC, *other courts and tribunals of status similar to HC and other tribunals as directed by Bar Council*.	Ruling: - ***No robing in MC*** - Do ***not*** ordinarily need to robe when ***appearing before judge in chambers***
Rule 4.28	**Notice to opponent** Where counsel ***delivers heads to court ex gratia, must at latest at same time hand heads to opponent***. There is no rule that counsel must give heads to opponent if he does not hand them to court. Must ***inform member timeously of legal point, not evident on papers which may catch him unawares and embarrass him in being so taken***. ***Must inform member when it is proposed to take exception or a technical point or make application under Rule 30 re pleadings, which may embarrass opponent***.	
Rule 4.29	**Recommending counsel or attorneys** Counsel of sufficient experience or standing may request instructing attorney to instruct particular counsel (junior) to act with him and may to that end surrender such portion of fee as agreed with attorney and junior. Save in exceptional circumstances, it is ***improper for counsel to recommend a particular attorney / firm to lay clients***.	Ruling - Declined permission for member to ***appear with an employee of an accounting firm*** (*who was an admitted advocate*) as his junior because it had ***not been shown that the accountant could not remain in the matter and bring his special skills to it without being briefed as junior counsel***.
Rule 4.30	4**Appearing before tribunal where counsel**	Ruling:

	is a member Save for exceptional circumstances, and with permission of Bar Council, it is improper for counsel to appear on brief before a board, statutory court or tribunal of which he is, at time of appearance, a permanent, temporary or acting member.	• Proposal that counsel appear only in Transvaal before Industrial Court and sit as member only outside Transvaal – rejected as not going far enough.
BRIEFS **Rule 5.1**	**Briefs and special retainer** Counsel may render professional service for reward ***only if briefed to do so.*** - ***May be briefed orally*** – but desirable to receive written brief. - May insist on written brief and refuse to continue to act until supplied. - For *pro deo* defences, counsel briefed when Bar Council / Court / A-G allocate matter to him. Counsel who is ***briefed at any stage of a case***, thereby receives ***special retainer*** and is ordinarily ***entitled to be briefed at every stage throughout that case***, unless given express notice to the contrary when receiving such first brief. - Does not apply when: ▪ Briefed on *purely formal motion* which does not necessitate merits of case being laid before him. (An application to sue by way of edictal citation is not regarded as purely formal.) ▪ Consolidation of actions ordered ▪ *Two counsel briefed* – ***senior need not be briefed for further particulars or interlocutory applications***. Counsel briefed for party during proceedings is ***not entitled as right to brief on appeal***. If counsel is ***offered brief to which other counsel is entitled*** and other counsel states not given up – *must ascertain from attorney why brief not offered to counsel entitled to brief*. ▪ Unless sufficient explanation ***counsel must refuse / return brief*** ▪ Sufficient explanation:	<u>Rulings:</u> - Not entitled to draft constitution for voluntary association for fee unless briefed by attorney - ***Acting for relative – must be briefed by attorney in ordinary way*** - Should ***not*** become *legal adviser to charitable organizations* - ***Brief on edictal citation triggers special retainer*** - Where counsel requested to reserve hearing date, ***entitled to charge fee on hearing even with no brief delivered – unless informed by attorney reasonable time before that not required*** - Insolvency of client does not deprive counsel of brief to which entitled - Junior counsel (not SC) entitled to brief to note judgment on trial - ***Brief on exception entitles to brief on trial*** - Pro amico brief – entitled to remainder of stages and to be paid if funds available

	(i) Includes *wish of lay client to be represented by someone else* (ii) If *attorney says not prepared to pay fee of other counsel* – must check that this is so in fact. ▪ ***Change of attorney*** or ***preference of attorne***y is ***not*** in itself sufficient.	
Rule 5.2	**Retainers** No retainer is binding on counsel *unless given in writing*. A retainer is the retainer of the lay client (i.e. not the attorney). • *General retainers* - Not binding for more than year from date of receipt. - Counsel not bound to accept - Implies that: ▪ ***During existence, holder will be briefed in every matter in which client is involved and in which it is appropriate*** (given nature of matter and standing) to brief him ▪ Counsel will accept all briefs in which it is appropriate having regard to standing and nature of matter, if it is possible for him and will not act for other side. - Does not require him to give up brief which he has already accepted from another client even if he could. - Retainer applies only to proceedings to which the client [not apply to subsidiary companies of client, unless expressly agreed], on whose behalf the retainer was given, is a party. - Does not apply when client appears jointly with another person. - ***Retainer gives no authority*** – still need brief to take any step in the proceedings. - If proceedings commence and *no*	<u>Ruling:</u> In the absence of a brief or special retainer, a member *is not entitled to charge a fee on a matter in which a client from whom he had a general retainer appointed other counsel*. His only remedy lies in terminating the retainer. Counsel who is briefed at any stage where the merits are involved is in the position of having received a special retainer in that case and ordinarily entitled to be briefed at every stage of proceedings unless otherwise agreed. Obviously, client may terminate the brief at any stage. But counsel is then not entitled to accept a brief (even on appeal) for the other side.

	*brief is delivered within reasonable time or offered a brief from other side and enquired from attorney but no brief / special retainer within seven day*s, then: ▪ May consider general retainer as determined; and ▪ ***May accept brief or retainer from other side***. ▪ But: (i) Non-delivery of brief to senior on occasion when usual to instruct junior only and only junior is in fact instructed does not determine senior's general retainer. (ii) And where more than one junior (or SC) on retainer, delivery of brief to one junior (or SC) does not mean others fall within this (iii) Non-delivery of brief which counsel indicated not able to accept does not fall within rule. ▪ Therefore, counsel offered brief where he knows another counsel on general retainer from that client is not precluded from accepting brief. • *Special retainers* - ***Implies member will take brief if possible and not act for other side***. - The acceptance of a special retainer does not oblige counsel to accept brief on dates not otherwise available. - No obligation to return special retainer fee if counsel subsequently finds it necessary to return brief for any proper reason – the special retainer fee is consideration for not taking other side's work. - Counsel on special retainer entitled to brief on every occasion where	

	counsel briefed in matter to which the special retainer applies ▪ Does not entitled SC to matter normally for junior ▪ Where more than one junior retained – does not entitle both to a brief where is it usual to use one junior only. • Reserving of hearing date - Where counsel agrees to reserve hearing date, entitled to charge fee on hearing even when no brief delivered – unless informed reasonable time before that his services are not required on that date.	
Rule 5.3	**Representations to public officials** Permitted to accept briefs to make representations to ministers, public officials or statutory bodies – but member is ***not obliged to accept such a brief***. All interviews should take place in presence of attorney unless would stultify the purpose of the interview or increase costs unnecessarily and substantially. Counsel should charge his usual fees for ordinary work; in determining fee, counsel may have no regard to relationship / friendship / influence with or special means of access to body. Generally, appointments for interviews should be arranged by attorney, not by counsel. Generally attorney should convey any information from the body to the client. Counsel may make written representations to public official. Such should usually be in the form of a memorandum, signed by counsel, but forwarded through attorney. Generally undesirable for counsel to conduct correspondence with such persons or bodies on behalf of the client; this is attorneys' work. Improper to be briefed in such matters when: - The object thereof is to *seek indulgence or exercise of discretion that would be contrary to law*	

	- Seeking to *add personal recommendation or approval to application made by client* - Seeking *private interaction and representations when law makes provision for public interaction and deliberations by a prescribed procedure.* Counsel do ***not*** need to go through attorney when dealing with DPP or senior prosecutors or members of their staff.	
Rule 5.4	**Briefs from spouses or relatives** [Deleted]	
Rule 5.5	**Briefs which could cause embarrassment** Counsel ***not obliged*** to accept brief when he has ***previously accepted brief to advise another person*** on or in connection with same matter. • ***Precluded*** from accepting such brief when: - *Any **confidential information** having any bearing whatsoever on matter was disclosed to him as result of first brief;* or - Might reasonably be thought by the person first advised that if counsel accepted second brief, such person would be ***prejudiced***. Where counsel *gave opinion to one side and not briefed to argue case* for that side – ***not necessarily precluded*** from taking brief to argue other side: - But, if he has been ***placed in possession of facts that would embarrass him in conduct of the case – must refuse the brief***. In ALL cases, he ***must get permission of both attorneys*** – if first refuses, ***<u>then counsel must refuse</u>***. Counsel who was Commissioner at enquiry in terms of Companies Act not allowed to accept brief from State or defence to prosecute / defend offence revealed in enquiry. Counsel who appeared for Liquidator at enquiry under Companies Act not allowed to	<u>Ruling:</u> - Member must ***not*** accept brief for ***two defendants or accused if likely to be conflict*** - Member needs leave of Bar Council to *act on matter he previously acted on as attorney* - Improper for magistrate to appear for party in connection with matter on which he had sat - A member who gave an opinion to heirs later appointed by Administrators of Estate. Heirs objected. Member must return brief. - A member who was consulted by the *father of a minor in connection with an accident case later briefed by the Insurance Company*. Plaintiff did not object. Still ruled he must return brief. - A member who ***appeared for the accused in a negligent driving charge could not appear on behalf of a third party injured in the accident in subsequent litigation***. - Member could not accept brief to represent accused where a previous client of his (who had pleaded guilty to house breaking) was the state witness. - Counsel could not appear for husband in divorce having previously appeared for the wife. - Counsel should not prosecute in a

	accept brief for person charged with an offence in connection with the company in question. Where counsel has held a brief for a party in any proceedings, he is not entitled to accept a brief on appeal from the other side.	trial where the accused had previously been a witness in an unrelated civil matter in which Counsel had appeared. - A member could not act against an insurance company that had previously employed him as a claims clerk in a matter that he had dealt with but could not recall. - Counsel given permission to act obo Jhb City Council where she had previously written letters as their legal advisor but letters dealt only with legal issues raised in the application and member had not been in a position to influence the legal advisors. - Attorney involved in but not in charge of matter was entitled to accept brief as Counsel.
Rule 5.6	**Independence of counsel** Brief should be ***refused*** if counsel ***occupies a position (or previously occupied a position) with respect to client or opposing litigant which might reasonably be expected to compromise his independence***. Brief should be refused if counsel might ***reasonably thought to have been in position to exercise influence in decision to brief him***: - Director must not accept brief from his company - Member of municipal council must not accept brief from that municipal council - previous director of a company in respect of a matter that arose when he was a director - counsel who was previously attorney should not accept a brief in a matter in which he was substantially in control to the extent that the independence of his advice with respect to / conduct of matter may be questioned - where, by reason of particular relationship (familial or otherwise)	

	between client and counsel or opposing litigant and counsel, counsel's ability to act independently would be compromised. Counsel may nevertheless accept such brief with ***Bar Council's prior permission*** in exceptional circumstances, on specified conditions, which may include direction that previous relationship be disclosed to court / tribunal. Brief should not be accepted where ***undue influence was brought to bear on client to decide to brief such counsel***.	
Rule 5.7	**Counsel is a member of voluntary association** [Deleted]	Ruling: - Undesirable when counsel was honorary secretary and organization existed mainly for litigation - Member of church could accept brief from church
Rule 5.8	**Arbitrations** Member acting as umpire or arbitrator ***should receive brief from attorney*** unless instruction from *formal arbitration body* recognised by GCB. Attorney who approaches counsel for consent to provide the brief. Member may not appear in arbitration unless briefed by attorney. Counsel may act for any tribunal or person whose decision may be reviewed and counsel may settle the formulation of reasons for such decision in language appropriate and simultaneously indicative of true meaning as intended by tribunal or person. - But, may not in any material respect add to, subtract from or alter true meaning of such reasons, as intended by tribunal or person.	
Rule 5.9	***Curator ad litem*** Member must obtain brief from attorney who asked him to be *curator ad litem.* Where attorney is thereafter blacklisted – curator, having been appointed by court, must continue with brief and then claim fees from estate.	Ruling: - Taxing Master's decision regarding fees allowed to counsel as curator *ad litem* may be taken on review by the counsel concerned - When counsel as curator *ad litem* interviews patient to determine whether he would be unable to

		manage his own affairs, such counsel is under no obligation to have anyone present when he interviews the patient.
Rule 5.10	**Commissioner** Must obtain brief from attorney when asked to act as Commissioner under Companies Act.	
Rule 5.11	**Senior-Junior relationship** It is ***recommended*** that Senior be *briefed with second Senior or with junior* where: - Matter in view of senior ***warrants and makes it desirable that such senior / junior be employed*** - Matter is one in which ***it was the practice of the Society concerned as at 1 January 1986 to have another senior or a junior briefed***. Member may, but is not obliged to, hold a brief or act professionally with an attorney in private practice in the Republic, but only: - Matter is one in which it the circumstances *warrant and make it desirable that two or more counsel employed*. - Member's instructing attorney is also attorney's instructing attorney. - Attorney is not the member's instructing attorney and also not from or associated with firm of instructing attorney. - Member must obtain Bar Council permission in all matters where required to act as junior to attorney. ***Where two seniors briefed, recommended that a junior be briefed with them***. *Senior may be briefed* (must have been briefed *at any stage after proceedings* including appeal commenced – thus would not include situations in which the counsel merely advised before the institution of proceedings or on prospects for appeal) ***without junior where senior engaged before taking silk***. It is junior's ***duty to be present throughout***	The old general rule deriving from English practice that senior counsel may not appear without a junior, has been abolished. However, in general practice, senior counsel are only employed in cases where the employment of more than one counsel is justified.

	the hearing of the case – improper to absent himself to attend to another brief - unless ***special circumstances arise which could not reasonably have been foreseen and where senior and attorney agree*** – if absent for substantial part of the day, not to charge fee.	
Rule 5.12	**Brief must be from attorney or patent agent (referral rule)** ***No member may take instructions or fees except on brief from an attorney*** or patent agent, but - may undertake ***defence at request of prisoner*** at maximum R100 - may undertake ***criminal defence or any other matter at request of judge*** - may undertake ***pro deo / dock defences*** Member may undertake wok on referral from a person who not a practising attorney but who: - Works at ***community-based law centre***, university clinic etc, or - in circumstances where GCB determines in ***public interest*** to do so - Subject to conditions which GCB may impose, such as: ▪ Member must be satisfied work can be carried out ***properly and competently without attorney's support, keeping in mind the limits of scope of an advocate's functions*** ▪ *Prospective client fully advised of work advocates do and scope of services* ▪ Must be written terms of work - lodged with bar secretary and detailed case records maintained ▪ Obligation to advise client at any stage if attorney needed and for member to cease to act if advice	**Duty to be briefed by attorney and not to do work normally performed by attorney** • ***Society of Advocates v De Freitas (NPD)*** • ***De Freitas v Society of Advocates (SCA)*** • ***GCB v Van der Spuy (T)*** • ***GCB v Rosemann***

	not heeded. *Pro Bono* work - Local Bar council may require its members to undertake *pro bono* work on basis that: ▪ It allocates work among members on basis that is fair, reasonable, equitable and transparent ▪ Rule about non-attorney briefing applies ▪ Member ***may recover fees in terms of a written contingency fee*** arrangement *lodged with and approved by Bar Council before commencing work.*	
LEGAL ASSISTANCE **Rule 6.1**	**Pro deo** It is the duty of all counsel to undertake *pro deo* defences when directed to do so by Bar Council. <u>Johannesburg Bar Rule</u> - Once *pro deo* brief accepted, ***remains member's responsibility and cannot be relinquished without prior leave of pro deo secretary*** - If postponed, remains member's obligation. Must inform court if date is unsuitable; if date nevertheless fixed, must inform *pro deo* secretary. <u>Johannesburg Bar Rule</u> Save with leave of Bar Council, no member may act ***as an assessor*** unless he has been a member of the Society for at least ***one year***. ***Pro Bono*** <u>Johannesburg Bar Rule</u> • Every member required to render minimum ***20 hours pro bono service each calendar year***. • Where member reserved for a day in court, day = ***10 hrs' service***. • Following work = *pro bono*: o On referral, without	<u>Ruling:</u> - Member must see pro deo prisoner ***personally*** to ascertain defence ▪ Must obtain permission from NDPP office ▪ Must be interviewed timeously so that witnesses etc can be located and subpoenaed - When accepted a pro deo brief from the state, *may not accept further fee from attorney in same case but may accept honorarium from the accused if offered by him* - May lead junior in pro deo – may not have pro deo junior and charging senior except with Bar Council permission - No member may take pro deo on understanding of promise of paid brief in future - Must always inform accused if not carrying out instructions for whatever reason, e.g. If took the view that leave to appeal should not be sought, must inform the client of this. - Cannot rely on pressure of work to justify lateness in pro deo - Discussions with investigating officer do not count as consultation for which a fee can be charged

	remuneration, from attorneys employed at university law clinics ○ On referral, without remuneration, from attorneys employed in NGOs ○ Referral from the Legal Aid Board or Justice Centre ○ On nomination by Bar Council to act *in forma pauperis* ○ On nomination by Bar Council to act, without remuneration, as the mentor / leader of a junior member where the junior is acting *pro bono* ○ Service without remuneration in or at prescribed rate in any adjudicative capacity in any court or tribunal in SA ○ Service, without remuneration or at prescribed rate in capacity of acting prosecutor or acting family advocate ○ On referral, without remuneration, from an attorney who is acting *pro bono* in matter ○ On referral, without remuneration, from a judge, magistrate or other presiding officer of any court or tribunal of the Republic ○ Any work that, in the opinion of the *Pro Bono* Committee, is to be regarded as *pro bono* service • Members may notify the committee of their specific areas of interest for purposes of *pro bono* work • A directory of members' names and contact details will be made available to the following so they can approach members directly to seek their services *pro bono*: ○ Institutions in the list above ○ The person administering *in*	- Where brief terminated by accused – obliged to withdraw but may accept appointment by the court as *amicus curiae* in order to conduct a cross-examination **Duty of *pro deo* counsel** • ***S v Gibson***

	forma pauperis nominations on behalf of the Bar Council o The Law Society of the Northern Provinces for distribution amongst its members • The institutions referred to above may refer to committee cases where problems encountered in application of this rule. • Once member appointed or accepted a brief to act *pro bono* such member: o ***shall disclose this fact to the court and opponent***, if applicable; and o may not relinquish the appointment or brief without the prior written consent of the committee (which has discretion). • By end of February each year every member must in respect of the preceding calendar year ***file with the Bar Council a certificate*** • Certificate must ***signed by member and indicate nature of the pro bono work done and number of hours***. • Where certificate discloses that the member has rendered ***less 20hrs an explanation is required. If no satisfactory explanation given this = unprofessional conduct***. • Where such certificate discloses more than 20hrs ***the hours in excess may be carried forward to the next year***. • Where member not filed certificate and no satisfactory explanation given this = unprofessional conduct. - The Bar Council entitled exempt Chairperson and Secretary and, in exceptional circumstances, other members of the Bar Council from the obligation to perform *pro bono* services for that year.	
Rule 6.2	**Circuit court prosecutions** Circuit Court Prosecutions will be allocated	

	by Secretary in accordance with directions of Bar Council in consultation with DPP.	
Rule 6.3	**Legal Aid** It is the duty of all counsel, so directed by Bar Council, to undertake legal aid matters. ***Payment in respect of legal aid matters takes place in terms of the prevailing agreement between GCB and Legal Aid Board***. Where counsel seeks payment of fees directly from Legal Aid Board he shall not thereafter seek to claim or recover payment of fees from instructing attorney.	
FEES **Rule 7.1**	**Fees must be reasonable** Counsel is entitled to charge a ***reasonable fee*** for all services. In fixing fees, counsel must avoid charges which over-estimate value of their advice and services as well as those which under-value them. • In determining amount of fee, proper to consider - ***time and labour*** required, ***novelty*** and ***difficulty*** of questions involved and skill required to conduct the cause properly - ***customary charges*** by counsel of comparable standing for similar services - ***amount involved in the controversy*** and ***importance*** to client • These are all mere guides in ascertaining real value of service • May ***not*** consider: - Client's *ability to pay* (though inability may warrant lesser fee or even none at all) - That the client has *won the case* (see Rules 7.1.5 and 7.2.3) - That the *attorney agreed to a higher fee than was justified* (see Rule 7.1.2 and ***Burger***) In fixing fees, it must not be forgotten that profession is a branch of administration of justice – not mere money making trade.	Rulings: - Where unopposed matter postponed *sine die*, counsel should at that stage debit a fee for an unopposed application even where it is clear that the application will be proceeded with in due course and thereafter at the resumed hearing (if any) he should debit a fee as on a postponement. - Where member requested to keep day open for trial and informed shortly before [if set down for 4 days and settles late on 2nd day, entitled to refresher fee for 3rd day but where settles early on 2nd day, may not be entitled to refresher fee for 3rd day] that postponed – entitled to charge refresher fee for the day. - Where during consultation, client admits guilt and brief returned – still entitled to charge for the consultation (and, in another case, for the trial) - Where counsel postpones a matter on behalf of other counsel because client not available, must charge postponement fee. But where the postponement is purely for the convenience of counsel, no fee is chargeable. - Where briefed to ask for a separate trial and a postponement, entitled only to an ordinary application fee. - Where submit written argument at conclusion of trial, entitled to charge a refresher fee provided the attorneys concerned are party to the

	Counsel must at ***earliest possible opportunity after being offered brief*** agree with attorney on: - *fee to be charged*; or if not practicable - *basis on which counsel will compute fee*. Such discussion must be undertaken ***at latest before brief is marked***. Agreement as to counsel's fees may include proviso re unforeseeable circumstances. Counsel need not reach agreement re fees with attorney where: - *Exceptional circumstances* - Where attorney *regularly briefs counsel and the basis upon which counsel charge is known to the attorney*. If, despite endeavour, not able to reach agreement, or where no agreement due to exceptional circumstances, counsel may determine ***reasonable fee***. • No agreement between counsel and attorney can justify excessive fee. [Suspended Rule: Where Bar Council sets out scale for minimum fees for particular services, such scale shall be fees recommended as minimum fees normally charged but shall be as guide for convenience of members – not unprofessional to charge less.] ***Full fees or no fees at all must be charged irrespective of results***. [thus ruling: should not reduce fees to accord with the fees which the taxing master had allowed because this would offend against the rule which prohibits charging fees on basis of result] Where dispute arises re fees – Bar Council or Committee may be requested to determine reasonable fee ➢ At least one practising attorney nominated by Law Society must participate in enquiry ➢ Dispute decided on oral or written	arrangement. - Cannot charge composite fee for civil trial lasting more than day – must charge refreshers. ▪ Does not apply to criminal trials - Where counsel if briefed on trial and the matter is crowded out and subsequently reinstated, counsel is not entitled to any fee if he returns the fee because he is not available for the later day. - In WLD, not entitled to charge a fee in an opposed motion matter if the matter is not heard owing to being crowded out. - If want to charge more than prescribed fee in Rule 43 application, must ask court for permission to do so. - Collapse fees = where have to set aside a ***substantial period of time for preparation and conduct of trial, can enter into an arrangement with attorney for a collapse fee*** – usually structured on a graded scheme starting at a higher rate, but can then renegotiate if counsel gets work in the reserved period. Note: the guiding principle is that the fee charged should be reasonable. - Senior and junior reserved for two week trial. Quoted reasonable fee on assumption trial lasted full period. Trial settled on second day. Counsel sought recover for entire period. Ruled that counsel not entitled charge fee for entire period. However, entitled charge reasonable fee (bearing in mind period for which reserved) and therefore entitled charge at higher rate for trial fee and refresher than figures originally quoted. Implied term that fees originally quoted binding upon counsel only in event trial lasting full period. - See Ruling 34, p. 234 for a definition of "collapse fee" – ***A collapse fee is a fee charged in addition to a trial fee and/or refreshers as compensation for counsel where a***

	presentations and, if necessary, on evidence ➢ Counsel must satisfy Bar Council that fee was reasonable one in circumstances ➢ Decision on fee final and binding unless notice of appeal in writing within 7 days to GCB committee ▪ Deliver to Honorary Secretary ▪ Must state grounds of appeal Alternatively, Bar Council may refer dispute to mediation to an ombudsman who is member of the Bar – if unsuccessful then dispute enquiry begins. If it appears member guilty of unprofessional conduct arising from charging of fees, then Bar Council may institute disciplinary proceedings.	***trial does not run for the full period for which counsel had been reserved***. - Not allowed to quote all-in fees in civil matters. See Ruling 33 - Where senior and junior briefed on a matter, senior should be consulted in relation to the junior's fee. Although no hard and fast rule in this regard, generally followed the two-thirds rule - Where counsel has worked on brief in preparation for a trial and has had to withdraw owing to his own unavailability, the member is only entitled to such fees as remains of value to his client that does not have to be done again by his successor. - Counsel robbed on way to court, as a result he was unable to attend court and conduct the trial – such member was not entitled to a fee for the day because he had not performed his mandate. - Sections 64 & 65 of Value Added Tax Act must be consulted and must agree with attorneys where VAT will be charged - Cannot accept a fee which he has not charged and which the attorney subsequently informs him has been allowed on taxation - Opinion of taxing master is not conclusive as to the reasonableness of the fee charged by counsel, but it is relevant - Sometimes, counsel is honour-bound to continue appearing (especially in criminal matters) when a client's funds run out – see Ruling 8, p. 221
Rule 7.2	**Marking of briefs** All briefs must be ***marked with a fee at earliest reasonable opportunity after which work has been done***. If fee ***not marked by attorney, this is an invitation for counsel to mark reasonable amount*** – entitled to it if attorney does not object. Once marked, fee not able to be altered due to result of case: • Once marked, a fee may not for any	Fee may e.g. be altered within the month on the request of attorney or because it was marked in error.

	reason be altered later than one month after it has been marked unless consent of Bar Council. A brief may not be marked "at such a fee as may be allowed on taxation". Where the Law Society briefs on disciplinary matters, these restrictions about marking briefs do not apply.	
Rule 7.3	**Agreement to charge no fees** Member ***may take brief on agreement to charge no fees*** – must give *notice immediately to Registrar or Clerk of Court and Secretary*; no fee then recoverable. Where a member agrees to no fees, no fees for such member shall be brought up for taxation by attorney instructing him. <u>Success fees</u> - In determining the success fee to be charged, counsel should have regard to: ▪ An ***estimate of amount*** or other relief that may be obtained by the client ▪ An ***estimate of eventual chances of success*** / ***failure*** ▪ An estimate of ***amount of work and complexity*** of case ▪ ***percentage by which success fee exceeds normal fee***. - In determining the amount of the success fee, counsel must specify normal fee, plus percentage, being success fee - Bar Council may review any such agreement and set it aside if fees claimed unreasonable or unjust - Bar Council may in reviewing and setting aside the agreement determine fees that are reasonable and just - Counsel shall mark fees whenever renders service – must set out normal fee, success fee and total fee.	
Rule 7.4	**Keeping of fee books** Duty of every member to keep proper fee	

	books showing at least: - ***Record of fees earned*** - ***Briefing attorneys*** - ***Sufficient details to identify matter and nature of work done***. Must also keep records to identify outstanding fees and period thereof. Must ***bank fees and bank deposit slips*** must available all times.	
Rule 7.5	**Rendering of fee lists** Each member shall at end of each month ***render a memorandum of fees due to him***.	
Rule 7.6	**Payment of fees** Counsel may require fees to be ***paid in advance***. If not done, fees become payable at end of period determined by Society [Johannesburg Bar rule: fees become ***due in the month they have been earned and are payable within 97 days thereafter***] - ***Cannot*** insist on payment of fees before then	
Rule 7.7	**Overdue fees** Counsel shall send fee lists to attorneys stating which fees not paid. Attorneys have until last day of second month following upon month when work was carried out and invoiced to fully settle amount. Johannesburg Bar rule: - Fees become due at end of the month in which they have been earned and shall be paid no later than 3 months and 7 days thereafter. Where non-payment by due date, member shall forthwith report the fact of non-payment to Bar Council in manner prescribed. Johannesburg Bar Rule: - Member to immediately notify Secretary on prescribed form of overdue fee - Secretary will immediately notify practitioner and give 7 days - If after 7 days, no payment and no *bona fide* dispute and no request for	

	extension, Secretary must notify each member in writing re default - Remains listed until all members give notice that they have received fees - Note that Bar Council can grant extension on fees at request of attorney - Where agreement to pay fees early and the attorney fails to do so, cannot have attorney placed on the list of defaulters without prior Bar Council consent. Where payment received from defaulter, counsel who placed attorney on defaulters list must inform Bar Council of that. Where there is a *bona fide* fee dispute, Bar Council can grant extension for payment pending its determination – otherwise fees remain due. Defaulter remains on list until all members give notice that they have received all fees, whether or not overdue. Bar Council must publish, for members' information, details of attorneys on defaulters' list in such way as to ensure confidentiality and must inform GCB and local Law Society accordingly; also when attorney removed from list. Attorney whose payment is due but who is unable, may apply for extension to Bar Council; extension only granted in special circumstances. Mere inability to pay is not sufficient, as it's presumed that attorneys cover themselves before they brief counsel. ***Save with Bar Council consent, counsel not permitted to compromise on amount owing by an attorney on default list***. Member may not withdraw notice of indebtedness given to Secretary in respect to attorney placed on defaulter's list, unless indebtedness discharged in full. If any dispute arises between member and attorney re fee, member must submit dispute to Bar Council for resolution before reporting attorney as defaulter. Where attorney partnership / company briefs counsel and then dissolved, wound up etc – counsel may demand payment of fees from	

	any member or partner ➢ If no payment all partners / members shall be placed on fee default list but payment by one discharges all from liability. The fact that Taxing Master has disallowed portion of fees charged by counsel in attorney-client bill of costs is not sufficient reason for Bar Council to take action in regard to dispute between attorney and member. ***Fees may only be waived with permission of Bar Council*** - Application must be *made by attorney* - If attorney approaches counsel for remission of fees, counsel must refer the matter to Bar Council and advise attorney accordingly. ***Member under no obligation to accept brief from attorney on list of defaulters*** - Bar Council may remove name from list or replace a name on the list at own discretion without obtaining consent of counsel affected. Member ***may levy interest*** on amounts due and payable calculated from due date for payment at the prescribed *mora* rate until date of receipt of payment.	
Rule 7.8	**Improper arrangements re fees** Counsel may ***not*** agree with attorney to *wait for fees until lay client pays attorney*.	
Rule 7.9	**Fees payable only by attorneys** ***Fees may only be paid by or through attorney*** or by LAB. Where member has reported attorney for defaulting on fees and a demand has been made by Bar Council for payment, unless attorney submits a dispute about those fees to the Bar Council within 30 days of demand, counsel may forthwith sue attorney for fees. Where dispute about fees resolved in way obliging attorney to pay an amount and attorney does not pay within 30 days, counsel may sue for fees.	

Rule 7.10	**Agreement to act on contingency fee basis** Counsel acting on contingency ***must comply with Contingency Fees Act, 66*** of 1997 [note: prior to the Act could not conclude contingency fee arrangements] and regulations and prescribed form of agreement. - Failing to do so is breach of Bar Rules. Agreement between attorney and client shall be ***counter-signed by counsel having satisfied himself that it complies with s2 and s3 of Act***. Agreement must explicitly state whether counsel elects to charge normal fees or a fee higher than normal fees - Either way, agreement must state what counsel's normal fee is - Where counsel stipulates for higher fee, must state explicitly what higher fee is – may not be more than 100% more than normal fee. - Counsel fee taken with attorney fee for calculating 25% max fee in s2(2) of Act [the fee recovered must not be more than 25% of the judgment amount] - Agreement may provide that only attorney or counsel who stipulated for higher fee is subject to abatement due to 25% maximum. ***Client may resile from contingency fee agreement within a 14 day period from conclusion***, or may approach the Bar Council to adjust the agreement. Counsel must ***ensure that higher fee charged remains proportional to endeavour and services rendered*** – mere delay in payment where little or no risk of failure exists will not entitle counsel to significant enhancement of normal fees. Where claim is money claim, agreement must provide for event of ***partial recovery and formula for abatement***. - Must also provide for the ***order of payment to counsel, attorney and***	

	client upon recovery of claim and costs. ***Agreement must record whether client is financially able to pay fee before receiving payment from the other party*** - Where *unable*, would be *improper to stipulate that fees are payable prior to receipt of payment from the other party.* May stipulate that normal fee is "such as may be allowed on taxation" notwithstanding the provisions of Rule 7.2.4 Agreement shall provide that if client refuses to accept advice of counsel, *then counsel may withdraw and if withdrawal for that or other professional reason then fees to date of withdrawal remain payable on success*. If counsel takes over brief from another counsel and there is reasonable possibility prior counsel concluded contingency fee arrangement – ***must ask about whether there was a contingency agreement and not accept brief until adequate arrangements have been made to secure payment of fees to previous counsel on success***. At earliest possible opportunity after work, counsel marks brief with fee which may become payable under agreement. Except for abatement –such fee may not be altered later than a month after marked without consent of Bar Council. Rule about full fees or no fees does not apply to fees under contingency agreement. Where client able to pay some fees in any event, irrespective of outcome, agreement may be concluded on balance of fees. Agreement must state what part is contingent and what not. • Not available for criminal or family litigation.	

Case law

- ***S v Sefadi*** (D, 1995): This case dealt with an accused's ***right to access to statements of State witnesses***. For present purposes, it is important because the judge canvasses the ***relationship between an accused's right to a fair trial and ethical rules pertaining to access to State witnesses by defence counsel***. Counsel for the state relied on Rule 3.3.2 of the Uniform Rules of Professional Ethics for his contention that the defence was not even entitled to interview State witnesses without the permission of the Attorney-General. The Court noted that if the right of access to information and the right to a fair trial under ss 23 and 25(3) of the Constitution are to be given their full effect, ***the scope and operation of this rule of ethics may also have to be reconsidered***.

Rules of conduct relating to advocates

Organisation of the Bar

- The GCB formulates rules of professional conduct ("the bar rules") that are applicable to all bars and may only be departed from by an individual bar council in exceptional circumstances. Bar rules not exhaustive and some individual bars have additional rules.
- Objects of the bar (i.e. each Society of Advocates): to promote and protect interests of profession and of members of the bar; to supervise the conduct of members; to consider, deal with and promote teaching and practice of law and administration of justice and to form a constituent bar of the GCB and further the aims of GCB.
- Object of GCB: to consider, promote and deal with all matters concerning the teaching and practice of the law and the administration of justice; to deal with all matters affecting the profession and to take action thereon; to uphold the interests of advocates in South Africa.
- GCB has *no jurisdiction over any constituent bar or its members except as follows*: It has the power to hear and decide appeals by members from decisions of constituent bars in disciplinary proceedings and appeals in connection with membership fees, as well as to hear and decide matters provided for in the constitution of a constituent bar or when requested by a majority vote of the members of a bar. It may further on its own initiative or whenever requested by a constituent bar so to do, recommend rules of professional etiquette and practice for adoption by the bars or a bar.

Discipline, Removal and Suspension

- The Admission of Advocates Act provides that subject to the provisions of any other law, a court of any division may, upon application, suspend a person from practice as an advocate or order that the name of a person be struck off the roll of advocates. This power is not merely limited to the court of the division where the advocate practises or resides or was admitted, but the ordinary rules of jurisdiction would apply. The court has a discretion and this discretion is vested in the provincial division which hears the application for suspension or striking-off. The discretion as to the action to be taken against an advocate rests in the first instance with the court of the division concerned.
- It is the function of the court of High Court to determine what is or is not improper conduct for an advocate. In doing so it will take cognisance of the rules of conduct laid down by the society of advocates of that division.
- The court is empowered to prohibit conduct which, though not in itself immoral or fraudulent may in its opinion be inconsistent with the proper conduct of a legal practitioner and calculated, if allowed, to lead to abuses in the future.
- Court of appeal will only interfere with discretion regarding striking-off or suspension when it was exercised arbitrarily or the court acted on wrong principle.
- Application for suspension or for the striking-off of the name of any person from the roll of advocates may be brought by ***GCB*** or by the ***bar council*** for the division which made the order for his or her admission to practise as an advocate or where such person usually practises as an advocate or is ordinarily resident.

Any person having chambers in any place will be deemed for these purposes to be a person usually practising in that place.

- In terms of the Admission of Advocates Act, the following grounds justify suspension or removal from the roll:
  - (a) in the case of a person admitted in terms of section 3(1), if he has ***ceased to be a SA citizen***;
  - (b) in the case of a foreign advocate admitted in terms of section 5, if he *has ceased to reside or practice as an advocate in the country where he resided or practiced at the date of his admission*;
  - (c) if the court is satisfied that the person is ***not a fit and proper person*** to continue to practice as an advocate; or
  - (d) on his *own application*.

Rules of conduct

- The GCB proposes rules of professional conduct for the members of all the constituent bars federated to it, but ***each society is at liberty to adopt or reject any such rule***. As individual bars are entitled to lay down their own rules of conduct and from time to time make rulings in respect of them it is to be expected that in certain minor respects there will be differences between the rules of conduct and etiquette of the various bars.
- The rules of conduct set out hereunder can be related to the following principles: First, there is the requirement of ***loyalty to the client***. This entails the advocate's duty of good faith and the obligation to further the client's cause to the best of his ability. Further there is the requirement of ***candour to the court*** which entails not only *frankness and truthfulness, but absence of deceit in any form and due respect for the judge*. Further there is the requirement of ***fairness to the adversary***, namely the opposite party, his witnesses and counsel. Lastly there is the ***obligation to adhere strictly to the rules of the society*** of which the advocate is a member and to which he has subscribed.
- An advocate should, while acting with all due courtesy to the tribunal before which he is appearing, ***fearlessly uphold the interests of the client without regard to any unpleasant consequences either to himself or to any other person***. (***S v Tromp***; *GCB rule 3.1*). In acting fearlessly he should not act foolishly or irresponsibly. (***S v Baleka***)
- In the conduct of the case the advocate may not use abuse, slander and vituperation. He is, however ***protected when making a defamatory statement in the interests of the client, pertinent to the matter in issue***, even though it be false, provided he has some reasonable cause for such conduct. There is no protection when the advocate goes out of his way to defame an individual and to allege or insinuate calumnious charges not justified by the occasion. (***Gluckman v Schneider***; ***Findlay v Knight***; ***Basner v Trigger***)
- ***When drawing pleadings counsel need not believe in the truth of the evidence that will be available to prove the allegations in the proceedings***. It is enough that the advocate ***does not know the evidence to be false***. An advocate will not be held liable for defamation if he sets out in a pleading allegations in the truth of which he has no belief, unless the advocate *knows that he will not be able to support them by evidence at the trial*. (***Findlay v Knight***; ***Basner v Trigger***). Counsel who has ***no belief in the truth of an assertion and knows he has no evidence to support it is not entitled to put it to a witness during cross-examination***. (***Gluckman v Schneider***; ***Basner v Trigger***). But allegations made by a witness which are going to be disputed have to be challenged. (***S v Xoswa***) Questions may not be couched as statements of fact to which others will depose when no evidence thereon is intended to be led. (***S v Kubeka***) ***Cross examination may not be hectoring, rude, unreasonable, intimidating, insulting and harassing***. (***S v Omar***; ***S v Gidi***)
- Argument by counsel at the conclusion of the evidence stands on different footing. Here counsel is putting forward submissions as to the weight of the evidence and the inferences to be drawn from it. *Considerable latitude is allowed to counsel who thus presents the case and attempts to persuade the tribunal to his view*. Animus iniuriandi is not to be attributed to him or her merely because the practitioner does not think his

submissions well founded or because they are pitched too high for reasonable acceptance. (***Basner v Trigger***)

- The advocate's ***duty to the court requires absolute honesty and integrity***.
- The advocate may not colour that which is unjust by pretence of law and may not by misrepresentation cause the judge to stray from the path of truth. (***S v Hollenbach***)
- Counsel is not ***a mere agent of the client; his duty to the court overrides the obligations to the client, subject to the duty not to disclose the confidences of the client***. (*GCB rule 3.2*)
- The independence and objectivity of counsel is compromised if he has identified with the issues by also being a witness. Where counsel has made an affidavit on the merits he should not appear as counsel. (***Carolus v Saambou Bank Ltd***)
- The ***overriding duty of counsel not to mislead the court*** directly or indirectly by misrepresentations, false statements or otherwise, may lead to a conflict between counsel's duty to divulge to the court material facts of which he or she has knowledge and the duty not to disclose to any person, including in a proper case the court itself, information confided to him or her as counsel.
- Counsel is ***obliged to inform the court of every authority or decision of which he is aware, whether it be advantageous or prejudicial to the client's case***. (***Toto v Special Investigating Unit***) He may not invite the court to enforce an illegal transaction and may not knowingly lead perjured evidence.
- It is counsel's duty in ex parte applications to ***disclose all material facts to the court***. (***Estate Logie v Priest***; ***Power v Bieber*** ; ***Ex parte Satbel***)
- As the system of justice is dependent on the quality of the assistance that advocates give to the court, it is essential that advocates, who hold themselves out as competent to practise in a particular field, ***bring and keep themselves up to date with recent authority in their field***. (***Ex parte Hay Management Consultants***).
- An advocate is ***not entitled in defending a client to attribute to another person the crime with which his client is charged wantonly or recklessly, unless the facts or circumstances given in the evidence or rational inferences drawn from them raise at least a reasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed***. (*GCB rule 3.3.3.4*)

Cross-examination

Duties

- Counsel has the following duties in respect of cross-examination:
  - (a) Prosecuting counsel has the duty to ***make available to the defence for the purpose of cross-examination the statement of a State witness*** who ***departs significantly from his statement to the police in his evidence-in-chief***. ***S v Radebe***
  - (b) A prosecutor should not subject an accused (or any other defence witness) to *harassing*, *badgering* cross-examination. ***S v Booi***; ***S v Omar***
  - (c) Counsel should ***not*** employ *bullying*, *insulting*, *browbeating*, *ridiculing* or *sarcastic* cross-examination. ***S v Gidi***
  - (d) Counsel has to ***treat the witnesses with respect***. The court has the duty to protect the witnesses from unreasonable and unwarranted attacks during cross-examination. ***S v*** Azov
  - (e) Counsel should ***not interrupt*** the witness or ask ***multiple*** or ***confusing questions***. ***S v Gidi***
  - (f) Counsel should ***not comment*** on the witness' *demeanour*, *reliability*, *honesty* or *credibility* ***during cross-examination***. That should be ***left for the argument*** stage of the trial. ***S v Gidi***

- (g) Counsel may ***not put to the witness as facts what counsel knows to be untrue***.
- (h) Counsel should ensure that what is ***put to the witness is correct and is supported by evidential material*** either already before the court or to be produced later***. S v Kubeka***
- (i) Counsel should ensure that what is ***put to the witnesses is correct and in accordance with counsel's instructions as the "facts"*** so put may be taken as admissions by the client. ***S v W***
- (j) Counsel has a ***duty to put to each witness as much of the client's version as the witness can reasonably be expected to be able to comment*** on if counsel intends to lead evidence disputing the version given by the witness. ***S v Xoswe***
- (k) Counsel should ***not ask questions which affect the credibility of the witness by attacking his/her character but are not otherwise relevant to the inquiry unless there is a "good faith" basis for them***; in other words, if there are ***reasonable grounds for thinking the imputation to be true***. If an advocate ***receives instructions form an attorney to the effect that there are such grounds, counsel may accept that instruction as prima facie a sufficient basis for the imputation,*** but not if the instruction comes from anyone other than the instructing attorney. GCB Rule 3.3.1.and 2
- (l) Counsel should ***not attribute to another person the commission of the crime in a criminal case unless the facts and circumstances raise at least a not unreasonable suspicion to that effect***. GCB Rule 3.3.4

Case law

- The ***purposes*** of cross examination are to: (1) ***weaken/dispute the case for the other side***; (2) ***elicit favourable evidence***; and (3) ***test the credibility*** of witnesses.
- ***S v Radebe*** (AD, 1973): When there is a serious inconsistency between the evidence of a state witness under oath at trial and his written statement to the State, the prosecutor is obliged to bring to the court's attention this inconsistency and to make the witness statement available to the defence for cross-examination, in the absence of compelling reasons to the contrary. If, however, the inconsistency is not fundamental, or if the accused has admitted the elements of the offence which are at issue in the witness statement, the statement need not be made available, because the defence will not be able to cross-examine the state witness on the elements, the accused having admitted them.
- ***S v Azov*** (T, 1974): Counsel in his heads of argument specially invited the Court to disagree with the magistrate's remarks in the record regarding the attorney's conduct of cross-examination. However, the Court was satisfied that the magistrate was fully entitled to say that the attorney was "rude, sarcastic and insulting, fired questions at them in quick succession and often interrupted them before they could reply fully". ***Witnesses who come into court, be they police witnesses or any other kind of witnesses, are entitled to the ordinary courtesy one extends to decent people***. Witnesses who give evidence are assisting the court in arriving at the truth and in carrying out the administration of justice. ***No cross-examiner is entitled to insult a witness*** or to treat him in the manner in which these witnesses were treated, *without there being a very good reason for it*. ***Witnesses must be treated with courtesy and respect***. They are doing a public duty in coming to court. That must be borne in mind by both cross-examiners and by presiding officers. *This does not mean that a witness may never be attacked, but before you can attack a witness you must at least lay a foundation to the satisfaction of the presiding officer that you have grounds for attacking the witness*. Otherwise witnesses must be treated with respect and with the same courtesy that you would extend to a man in civilised society.
- ***S v Booi*** (E, 1964): It is the function of a prosecutor to ***conduct himself with restraint*** and with ***due regard to the rights and dignity of accused persons***. A cross-examination must naturally be as *full and effective as possible*, but it is ***unbecoming in a legal representative - especially in a prosecutor - to subject a witness, and particularly an accused person who is a witness, to a harassing and badgering cross-examination***.
- ***S v Makaula*** (E, 1964): The injunction in ***Booi*** is still more serious when a *presiding officer* follows suit. A witnesses being questioned by the court should be treated in a manner aimed at ***enlisting the sympathy of the witnesses and the public with law and order***. Inappropriate to conduct harassing cross-

examination of minister of religion because this discredits the court and makes adverse impression on witnesses and public.

- ***S v W*** (AD, 1963): In the trial, the cross-examiner put the following to a witness: 'The accused will say that he was in your company only one night in January, 1961, but that he was so drunk that he could not remember whether or not he had intercourse with you, and that when you blamed him later on as being the father of your child, he did not know what to believe or do.' It was held that this could be used against the accused as corroboration for the State's case. While disputing the major issue of intercourse as deposed to by F, appellant, through his attorney, at the same time asserted: (i) that *money had been paid by him to F in a total sum exceeding that which she herself maintained*; and (ii) that he had *been in F's company only on 'one night in January, 1961', when intercourse might possibly have occurred while he was drunk*. ***Although advanced only in cross-examination, these assertions were specifically and deliberately made***: the facts of the case do not admit of the possibility of any error on the part of the cross-examining attorney. In the context of F's evidence, ***these assertions were held to be unequivocal admissions*** by appellant of the matters so asserted. Having been made during the actual hearing in the trial court, ***the admissions in question required no additional formal proof before they may be used against appellant***. These admissions manifestly constituted corroboration of F's evidence in a material respect. [In other words, if a cross-examiner says to a witness "the accused will say xyz", xyz may be used against the accused].
- ***S v Xoswa*** (C, 1965): Where the State *intends to discredit evidence of an accused* it should ***cross-examine to that end in order to enable the accused to meet the State's case***. In other words, ***counsel has a duty to put to each witness as much of the client's version as the witness can reasonably be expected to be able to comment on if counsel intends to lead evidence disputing the version given by the witness***. Failure to cross-examine may leave an assertion unchallenged, and the *absence of challenge in cross examination may lead the court to find that the onus has not been discharged either because the unchallenged version creates reasonable doubt*, or because in a civil case it affects the discharge of onus on balance or probabilities.
- ***S v Kubeka*** (W, 1982): While it is perfectly permissible *cross-examination to test a witness' version of events by ascertaining the details thereof and then by interrogating him about them*, ***one ought not in cross-examination so to couch one's questions that they appear as statements of fact to which others will depose*** *when in truth the 'facts' in question are not part of one's case and no evidence is intended to be led thereon*.
- ***S v Omar*** (N, 1982): The Court, in an appeal against the appellant's conviction on various counts of theft and forgery and uttering, held that the ***conduct of the prosecutor in cross-examining the accused was unseemly and unfair, being hectoring, rude and unreasonable***, and that, *even though the accused's counsel had not objected to such cross-examination*, ***the presiding officer was not absolved from ensuring that he received a fair trial*** or from requiring those who appeared before him to comport themselves properly in his court. The Court found, however, that the accused *would have remained an unsatisfactory witness even if fairly questioned*.
- ***S v Gidi*** (C, 1984): The proceedings at the trial in a criminal case in a magistrate's court were held to be ***irregular*** by reason of the ***cross-examination by the prosecutor of the first accused*** (who was undefended), in that the cross-examination was found on review to have been ***intimidating, insulting, harassing and overbearing***. Furthermore the second accused at the trial, *having seen how the first accused had been cross-examined, had declined to give evidence*. The Court held that an irregularity had accordingly taken place which resulted in a ***failure of justice*** within the meaning of s 322 (1) of the CPA. The ***convictions of both the accused were set aside***.
- Although cross-examination may and often must be *thorough*, *complete* and *effective*, cross-examination of an accused ***should always be impartial***. It should ***not be biased or prejudiced against him, and should never seek to conceal or withhold evidence or facts known to the prosecutor which may favour the accused*** in his defence or may be of a mitigating nature. This follows from the purpose of cross-examination, and the duty of a prosecutor, which is to ***assist the court in its enquiry into the true facts of the case*** and hence in the proper administration of justice. It goes without saying that a prosecutor ***should not in cross-examination put to an accused, or imply in his questions, an assertion adverse to an accused which the prosecutor knows is false***. A proper cross-examination does ***not*** permit the

gratuitous intimidation of an accused. A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude which admits of no contradiction by the accused of what is put to him. A prosecutor ***should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability***. In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor. ***Conduct of this kind offends against good manners, politeness and humanity***. That is sufficient reason for refraining from such unseemly behaviour. What is more important for the administration of justice is that ***tactics of that kind are a negation of the object and purpose of cross-examination***. ***Bullying interrogation is not directed at an enquiry into the true facts, but is calculated to intimidate an accused into fearful or hopeless concessions or admissions which may be untrue or to prevent an accused from having an opportunity to give an explanation of some circumstance for which there may be an exonerating or mitigating explanation***.

An accused must be given a ***fair chance to answer the question put to him***. His answer ***must not be interrupted from the bar***. The next question must not be put before the previous one has been fully answered.

Questions should be in a form ***understandable to the witness so that he may answer them properly***. ***Multiple questions***, that is to say, interrogation which poses a series of questions for simultaneous answer should be *avoided* because they tend to confuse. ***Long and involved questions should be avoided when short and simple questions suffice***.

A prosecutor must ***reserve adverse comment on the evidence of the accused, his demeanour, unreliability, lack of credibility or dishonesty for his address to the court***, and ***not use it as a weapon for attacking the witness during the cross-examination***. A prosecutor should not so identify himself with the case for the State that he loses his objectivity. He must not associate himself personally with an attack upon the accused in cross-examination. ***He should not express his personal sentiments or emotions of hostility, distaste, repugnance or disbelief by venting them at the accused in cross-examination***.

It is the ***duty of the court to restrain a prosecutor from the conduct mentioned and to protect an accused from these misguided methods of interrogation***. Where an accused appears on his own without the assistance of a lawyer, the prosecutor's duty of fair cross-examination and the court's duty to ensure that the cross-examination is fair should be the more assiduously observed. ***Where a magistrate does not stop conduct such as that described, it may appear to the accused and to others that the magistrate is associating himself with the unfair treatment*** of the accused by the prosecutor. In that event ***justice is not seen to be done***.

Authority of counsel

Technique in litigation

- *Within the limits of the brief and subject to any specific instructions*, ***counsel has a complete discretion in the conduct of a case***. In ***R v Matonsi***, it was held that there was ***no authority which supports the view that in a criminal case an accused can question his counsel's conduct of the trial***. Once the client has placed his case in the hands of counsel, the latter has complete control and it is he who must decide, for example, whether a particular witness (including the accused) is to be called or not.
- Morris suggests that a distinction must be draw between the authority of counsel to make ***concessions*** that, in his discretion, need to be made in the conduct of a case, and a ***compromise*** of the claim as such. Morris suggests that the *former is authorised and the latter not*. This view is also expressed by Judge van Dijkhorst in Lawsa: ***unless counsel receives instructions, either express or implied, to compromise, he has no authority to do so***. In ***Hawkes v Hawkes***, a client was permitted to resile from an undertaking which her advocate had given but for which the advocate had been given no mandate. The Court held that *although counsel has authority to compromise an action or any matter in it, no such compromise will be binding if it flies in the face of the client's instructions to the contrary*.

Duty of counsel to their client

Technique in litigation

- Counsel's duties may be summarised as follows:
  - (a) the requirement of loyalty to the client: this entails the advocate's duty of good faith and the obligation to further the client's cause to the best of his ability;
  - (b) the requirement of ***candour to the court*** which entails not only *frankness and truthfulness, but absence of deceit in any form and due respect for the judge* – counsel is not a mere agent of his client and his ***duty to the court overrides his obligations to his client***, subject to his duty not to disclose the confidences of his client;
  - (c) the requirement of ***fairness to the adversary***, namely the opposite party, his witnesses and counsel; and
  - (d) the ***obligation to adhere strictly to the rules of the society*** of which the advocate is a member and to which he has subscribed.

Liability of counsel for negligence

Technique in litigation

- There is ***no reported decision*** on a claim for negligence against an advocate.
- Counsel at the English Bar were for at least two centuries considered to be ***immune*** from claims for damages arising out of their professional activities. This immunity was grounded in considerations of public policy. This special immunity was ***abolished*** though by the House of Lords in **Arthur Hall & Co v Simons** in 2000. It ***still exists*** in Australia.

Disagreement with client

Technique in litigation

- If an accused, in spite of his advocate's advice to the contrary, insists on going into the witness box and thereby makes it ***impossible for his advocate to exercise his legal ability honourably and faithfully, then the advocate must withdraw from the case*** rather than act contrary to the express wish of his client.
- Schreiner JA said as follows in ***Matonsi***: "Cases of disagreement between the views of client and counsel arise from time to time and ***counsel may find himself between the Scylla of precipitately, and therefore improperly, withdrawing from the case, and the Charybdis of unreasonably overriding his client's***

will. The decision may be particularly difficult where the accused is being defended on a capital charge by counsel who is acting *pro deo* without other legal assistance."

- Morris suggests that ***counsel should with withdraw where his client overrides his advice and counsel feels that his position becomes untenable*** because, for example, he is of the opinion that question which he would have to put in leading his client's evidence would produce answers damaging to his client's case. If counsel feels it right to disregard his client's wishes on such a matter, he may do so and will not be held to have acted improperly in doing so.
- In every case in which counsel withdraws it is his ***duty to ascertain that his client understands the reason for the withdrawal and the consequences both of the withdrawal and the course of proposed conduct which has led to that withdrawal.***

Admissions by counsel on behalf of their clients

Technique in litigation

- Admissions may be made deliberately and formally by an attorney or counsel at any stage of the litigation with the object of saving time and money by rendering it unnecessary to call witnesses to prove matters which are not really in dispute.
- But what is the effect of erroneous admissions by counsel?
- Counsel must exercise his calling with *care*, *skill* and *diligence* and should be careful to refrain from making incautious concessions or admissions. But mistakes will happen and a ***counsel who realises that he has mistakenly made a concession should say so fearlessly and promptly***.
- The English law on the subject is summarised as follows, and probably reflects the position in SA:
  - statements by counsel in the presence of his client or his instructing attorney are ***evidence against the client unless repudiated***;
  - undertakings given by *counsel without authority will not be accepted by the court*;
  - undertakings given by counsel in court and accepted by the court or the opposing party ***should be as scrupulously observed as if embodied in an order of court***;
  - a communication by counsel outside court to the opposing party or his attorney has not the same effect as on proceeding from the attorney who instructs counsel.

Case law

- ***S v Maweke*** (AD, 1971): A formal admission by counsel made in terms of section 284 of the CPA should be fully and accurately recorded.

Invective, irrelevant or defamatory material and freedom of speech in court

Technique in litigation

- An advocate is ***protected*** when he makes a ***defamatory statement in the interests of his client if it is shown*** that (a) the statement was ***pertinent*** and ***germane*** to the issue, and (b) it has some ***foundation in the evidence or circumstances surrounding the trial***. This applies to *both* civil and criminal proceedings. However, a plea of privilege ***cannot prevail*** if the person claiming damages for defamation can establish ***malice*** on the part of the defendant.
- From the case law, the *following principles* can be distilled:
  - (a) defamatory language may be used only if ***germane*** to an issue actually being tried by the court;
  - (b) the advocate is ***not in all cases obliged to satisfy himself that the allegation is true***. Counsel *may act upon the instructions of his attorney* and *may reasonably assume that the attorney has taken all steps necessary to justify the use of the information*;

- (c) the use of strong language or the couching of a proposition in terms wide than in fact justified will not normally be vested with pecuniary consequence upon the practitioner responsible;
- (d) it is the ***occasion*** that is privileged not the capacity of counsel. *Outside court*, counsel talk at their peril.
- (e) the ***nature of the tribunal is irrelevant***; it is the *capacity of a forum* that creates a privileged occasion;
- (f) counsel is ***not required to usurp the functions of the judge and decide upon the truth of what he states***; he is protected ***unless he knew the statement to be untrue or unless there was reasonable grounds to believe that it might be true***.

- If counsel has ***proper basis for accusing witness of lying, he can do so***. This is a privilege and must be narrowly used: it must be used ***within the ambit of the qualified privilege*** that applies to counsel and witnesses.
- Litigation privilege applies directly to counsel and witnesses. ***If a witness tells the truth and this is defamatory, an action for defamation cannot be brought***.
- Counsel may also say defamatory things about people in court as part of their duty. So long as this is within legal grounds, this is protected.
- The test for the existence of this qualified privilege is (i) ***relevance/necessity***, and (ii) ***foundation for the proposition***.
- Counsel does ***not*** need to believe in the truth of the statement, it is sufficient if (i) and (ii) above are complied with.
- ***Findlay v Knight*** suggests that ***recklessness to the truth defeats privilege*** but ***Joubert v Venter*** suggests that ***recklessness to the truth is not sufficient*** and that *something more* is required (such as malice).
- ***Malice is not permissible*** – if it can be shown that the statement was made maliciously, the privilege is defeated.

Case law

- ***Findlay v Knight*** (AD, 1935): An attorney filed a plea containing defamatory allegations regarding the plaintiff, ***despite knowing that there was no evidence to support the allegations***.

  The Court noted that advocates and attorneys ***conducting cases in open court enjoy qualified privilege to utter defamatory statements unless they are spoken animo iniuriandi***. This qualified privilege embraces two principles of public policy:

  - (a) welfare of society demands that an advocate who pleads cause of client should have large degree of freedom in laying client's case before court, even if in so doing he defames a third party. *Qualified privilege extends to the pleadings and other documents to be placed before the court*; but
  - (b) ***process of courts should not be used for wanton defamation of litigants or third parties***. An advocate or attorney must show that he had ***reasonable foundation*** for the defamatory charges.

  The Court held that ***irrelevancy and improper personal motive (e.g. spite or malice) are usually facts from which animus iniuriandi can be inferred***. But *even if these facts don't exist,* ***there will be animus iniuriandi*** *if the advocate*:

  - (i) ***knows charges are false*** (or does not care whether charges are true or false); or
  - (ii) ***knows, or ought reasonably to know, there is no evidence of the charge***

  In every case, it is for the court to consider whether, in the circumstances of the particular case, the licence accorded to a pleader has been transgressed or not. The purpose of the defamatory allegations is important: ***has it been made for the legitimate and honest purpose of laying the claim or charge before the court?***

  The Court touched on the key difference between advocates and attorneys being that an advocate ***does not get information from client***, but from an *attorney*; accordingly, an ***advocate is entitled to presume***

that evidence for attorney's allegations will be forthcoming. In contrast, an attorney must confirm evidence for client's allegations.

- ***Preston v Luyt*** (EDL, 1911): An attorney cross-examined a witness in forgery case. The witness was a magistrate who had been called to produce the record of civil case. The aim of the cross-examination was to show that the prosecution was maliciously instituted the proceedings and to dent magistrate's credibility. In doing so, ***the attorney asserted that witness had committed adultery, which was false, malicious and irrelevant to proceedings***.

  The Court held that an advocate is ***protected*** when he makes a defamatory statement in the interests of his client, ***pertinent*** to the matter in issue, ***even though it be false, provided he has some reasonable cause for his conduct***, i.e***. reasonable grounds for believing it to be true, even though it is in fact false***. ***But if he acts maliciously, and says something altogether unjustifiable and not pertinent to the cause in any respect, even on instructions of attorney, he exceeds the privilege***. No protection is afforded when he goes out of his way to slander an individual (i.e. unlike in England, Roman-Dutch law affords no absolute privilege to advocate/attorney in court). Malicious defamatory statements in cross-examination do not serve objectives of cross examination nor in interests of justice. Witnesses must be protected from this; otherwise will be reluctant to come forward.

  The Court further noted that an advocate should ***refrain from unnecessary defamation and insult***, however an advocate ***may comment severely on conduct and character of witnesses if there are reasonable grounds to do so***. ***The Court assumed that if the statement was construed pertinent to the case, there was no intent to injure***. Repetition of defamatory statement may amount to separate cause of action - e.g. repeating a defamation outside court.

  In the present case, evidence of malice found in *lack of reasonable grounds*; *history* between attorney and magistrate (who, on occasion, reprimanded attorney); *vindictive attitude* of attorney; effort attorney made to have a reporter present, promising him a "good copy".

- ***Basner v Trigger*** (AD, 1946): An advocate made a statement ***in argument*** that was defamatory of the defendant. The Court held that ***Gluckman*** and ***Preston*** must ***not*** be interpreted to support the proposition that **absence of reasonable grounds for belief in truth of statements in itself constitutes animus iniuriandi**. Absence of such grounds ***merely provides cogent evidence that there was no such belief, which, in turn, will generally lead to inference of animus and so defeat the privilege***. Further, while approach to privilege is along same lines in context of argument as it is in contexts of pleadings and of cross-examination, it stands on somewhat different footing. The state of mind of pleader or cross-examiner can be tested by material to substantiate what he alleges. But argument takes place after evidence has been led and, with regard to facts, simply consists in placing that evidence in the most favourable light. ***Considerable latitude must be allowed to party who is thus presenting his case***. Malice must ***not*** be attributed *merely because counsel does not think his submissions are well founded or are pitched too high for reasonable acceptance*. ***Even far-fetched and fantastic contentions cannot, in themselves, provide evidence that they were advance from improper motive***. Regarding matters stated in argument, their ***relevancy*** is mostly decisive as to whether or not there is intrinsic evidence of malice.

- ***Gluckman v Schneider*** (AD, 1936): An attorney, while preparing for defence, was informed by an acquaintance that he had been informed that the plaintiff had 2 previous convictions. The Court held that ***where an advocate has some hearsay evidence that charges made were justified, the legal inadmissibility of the evidence does not deprive him from relying on it***. Furthermore, an advocate, instructed by attorney to make defamatory charges, ***may assume that the attorney has proof of the charge***. However, the ***basis for making the charge must be reasonable on consideration of evidence in all its aspects***. If the evidence is more consistent with absence of belief than the contrary, then animus may be inferred. In the present case, it was held that counsel had made the accusations ***recklessly without caring whether they were true or false*** and ***without reasonably grounds for believing them to be true*** and that though the occasion was privileged, animus iniuriandi had been correctly infrared by the court a quo.

Counsel's duty not to mislead the court

Technique in litigation

- It is the duty of counsel to ***inform the court of any matter which is material to the granting of an application, and of which counsel is aware***.
- The court will always accept and act on the assurance of counsel in any matter heard in court and, in order to deserve this trust, counsel must act with the ***utmost good faith*** towards the court.
- Morris suggests that the duty applies ***primarily in ex parte applications***. In *opposed or defended matters* the duty might be stated as a ***duty not to actively mislead the court***. It would probably ***not be held to require the disclosure of weaknesses in one's case***, but might ***cover the suppression of a fact, unknown to the other side, which would completely disentitle the client to the relief claimed***. This includes a duty to ***refer the court to reported decisions which are clearly adverse to one's case***.
- When an ***accused confesses to counsel*** during the consultation preceding the trial, the situation should be dealt with as follows:
  - (a) advise the accused that he should ***plead guilty***;
  - (b) if the accused *declines* to do so, advise him that ***counsel cannot ethically continue*** to conduct the trial ***on the basis that evidence will be adduced by the defence in support of a defence which, in the light of the confession, will be false***;
  - (c) advise the accused further that it will ***not be open to counsel to cross-examine witnesses in such a way as to suggest a defence***;
  - (d) advise the accused that the only way for counsel to continue conducting the trial would be on the basis that ***counsel may test the evidence by cross-examining the state witnesses with regard to the reliability of their observations***;
  - (e) advise the accused that ***counsel cannot call him as a witness***; (He cannot be called to deny that he has committed the offence and he should not be called to 'confess' that he has committed the offence.)
  - (f) argue the matter on the basis that there has ***not been sufficient proof of the accused's guilt***;
  - (g) if the accused insists on proceeding with some defence – which counsel will know to be false - counsel should make it plain that he/she cannot continue to act on those instructions and ***withdraw*** from the matter;
  - (h) the withdrawal has to be effected in such a manner as ***not to prejudice the accused***. See GCB Rule 3.2.
  - ***Where counsel's duty to the client comes into conflict with counsel's duty to the court, the latter must prevail***.
- If counsel makes a positive statement regarding X, and then discovers X is not true, then he has a duty to disclose this to the court.
- ***Where your client tells an untruth, you can still present this to the court. But you cannot tell an untruth***. In a trial, you must put your client's version to the other side's witness.
- An advocate is ***obliged to put his client's version before court but he is also obliged to tell the court what further information he has which may cast doubt on that version*** i.e. the basic facts if these facts have a material impact on the court's assessment of the case. They should be made known to the court.

Case law

- ***Ex parte Swain*** (N, 1973): This application was an application for admission as an advocate in which the applicant failed to disclose material facts in his application. The Court emphasised that ***when the court seeks counsel's assurance that a certain set of facts exists, the court must be able to rely implicitly on any assurance given***. The proper administration of justice could not easily survive *if the attorney and advocate professions were not scrupulous of truth in their dealings with each other and with the court*.
- ***Swain v Society of Advocates*** (AD, 1973): The Court held that an appellate court will only interfere on appeal on recognised grounds, i.e. *where findings of fact on which decision was based were wrongly made*.

In respect of admissions as advocates, the onus is on applicant to show he is fit and proper person to be admitted. The applicant must show there were no grounds which could reasonable justify exercise of a discretion by court a quo against him. The court a quo held that applicant's *failure to disclose* in his affidavit the fact that he had settled a certain action to protect his own interests at expense of those of his client (he had missed the deadline for the filing of one client's claim and so settled that client's claim against his other client in order to avoid a claim against him) and to state why he had settled it, was a ***breach of the duty of utmost good faith which the professions of advocates and attorneys require***.

- ***S v Hollenbach*** (NC, 1971): A father and son were charged with unlawfully purchasing diamonds from police traps. The son pleaded guilty and the father pleaded not guilty. Both were convicted in separate trials. The same attorney appeared for both of them. In mitigation of the son's sentence, the attorney informed the court that the father had played the main role in the crime. This was in fact false because the son gave evidence in father's trial that he (the son) was solely responsible. The Court has right not to be misled by a legal representative. The attorney was required to act with integrity and integrity demanded that the attorney not allege that father was the main perpetrator as a mitigating factor in hearing on the son's sentence. The Court was thereby misled.
- ***Society of Advocates of Natal v Merret*** (N, 1997): Merret, an attorney acting for the plaintiff in a divorce action was asked by the judge whether the defendant's attorney knew that the matter was proceeding on that day on an unopposed basis. Merret answered in the affirmative when he did not actually know but had reason to believe that the defendant wanted to defend the action. Quoting ***Swain***, the Court held that it could never implicitly trust in or believe what Merret said from Bar. He had deliberately misled the court because he was in an awkward position as his client flew all the way from Cape Town for the divorce, which would not have proceeded on an unopposed basis if he disclosed that he did not know whether the defendant's attorneys knew the matter was being heard that day. The Court reiterated the requirement that advocates and attorneys should be honest and truthful in their dealings with each other and with the court.
- ***Kekana v Society of Advocates*** (SCA, 1998): Legal practitioners occupy a unique position. On the one hand they ***serve the interests of their clients***, which require a case to be presented *fearlessly and vigorously*. On the other hand, ***as officers of the Court, they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence***. Both professions (advocates and attorneys) have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately the observance of the rules is not assured because what happens between legal representatives and their clients or witnesses is not a matter of public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that ***absolute personal integrity and scrupulous honesty are demanded of each of them*** and, secondly, that a ***practitioner who lacks these qualities cannot be expected to play his part***. As a matter of principle, an advocate who lies under oath in defending himself in an application for the removal of his name from the roll cannot complain if his perjury is held against him when the question arises whether he is a fit and proper person to continue practicing.

  The applicant, an advocate, had submitted inflated accounts to the Department of Justice, together with their pro Deo claims. The Bar Council had held an enquiry and decided to apply for his name to be removed from the roll of advocates. The matter was referred to oral evidence and the applicant testified under oath. The Court a quo rejected the applicant's evidence, which was the same as that provided to the Bar Council's committee investigating his conduct and that contained in his answering affidavit, as being untruthful. The Court a quo found the applicant not to be a fit and proper person to practise as an advocate and ordered his name to be removed from the roll. It was held that *the applicant had given false information to the Bar Council's committee, had committed perjury in his opposing affidavit and had repeatedly done so again when he testified in Court*. His lies were premeditated and obviously well rehearsed. That he had done so in an attempt to protect his own interests and not in his professional capacity was no excuse. There could be no assurance that should he ever find himself in a position where he could prevent a witness from misleading the Court he would do so. ***The applicant had been exposed as a person who lacked the qualities of absolute personal integrity and scrupulous honesty demanded of practitioners and could not be expected to play his part in preserving a high standard of professional ethics***. The appeal was dismissed.

Duty to disclose material facts when making ex parte applications

Commentary

- The ***utmost good faith*** must be observed by litigants making ex parte applications in placing material facts before the court, so much so that ***if an order has been made upon an ex parte application and it appears that material facts have not been disclosed, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs***.
- In ***Schlesinger v Schlesinger***, the following principles applicable to the uberrima fides rule were extracted from the relevant authorities:
  - (a) in ex parte applications ***all material facts must be disclosed which might influence a court*** in coming to a decision;
  - (b) the non-disclosure or suppression of facts ***need not be wilful or mala fide to incur the penalty of rescission***; and
  - (c) the court, apprised of the true facts, has a ***discretion*** to set aside the former order or to preserve it.
  - In ***Trakman v Livshitz***, the AD pointed out that there was ***no authority*** for ***extending to opposed motion proceedings the principle applicable in ex parte applications*** that they can be *dismissed solely on the ground that the applicant failed to disclose fully and fairly all material facts known*. Material non-disclosure, mala fides and the like in motion proceedings may be dealt with by the making of an ***adverse or punitive order as to costs*** but cannot serve to deny a litigant substantive relief to which he is otherwise entitled.

Case law

- ***Logie v Priest*** (AD, 1926): This matter involved a petition for the sequestration of the respondent's estate. The application was launched *despite a settlement agreement for payment of an outstanding debt having been concluded*. No reference to this agreement was made in the petition. On appeal, it was held that *the fact and terms of the settlement should have been brought to the attention of the court*. In ex parte applications, ***it is the duty of the applicant to lay all the relevant facts before the court so that it may have full knowledge of the circumstances of the case before making its order***. The settlement was a relevant and important circumstance in the proceedings; had the judge been advised of the settlement he may not have granted the order for sequestration.
- ***Power v Bieber*** (W, 1955): The applicant, as the liquidator of a company, had applied for and had obtained a commission of enquiry for the purpose of examining the directors of the company in relation to their conduct in and about the affairs of the company. While this commission was sitting, *one of the directors applied ex parte to a judge in chambers for a commission of enquiry into the conduct of the liquidator in the liquidation itself*. He alleged waste, mismanagement and inefficiency and, generally, that there had been mal-administration in regard to the realisation of the company's assets and conversion into cash. Part of the Court's order was that the record of the application and of all proceedings consequent thereon be kept confidential and private. While in the beginning the liquidator was not permitted to see the petition, the veil of secrecy was later lifted and the applicant obtained the consent of the majority of creditors to move the Court to have the order appointing a commission set aside. ***It transpired that the director had not represented the facts fairly and properly to the judge***.

  The Court discussed the subject of ex parte applications and counsels' certificates of urgency. Too often in the judge's experience had he found that certificates of urgency are presented when the urgency does not exist. ***The rule as to complete candour and disclosure on the part of the applicant in ex parte proceedings is well known***. ***The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court***; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, *the Court has a discretion to set the order aside on the ground of non-disclosure*.

  There is a type of applicant, acting no doubt under advice, who seems to think that a ***tactical advantage*** will be achieved by establishing a certain position upon an order obtained ex parte. ***This should not be so and it is recognised in the ordinary way that a person affected by such an order, who has not***

received notice, will not be allowed to be prejudiced by its grant. These orders are granted in the privacy of a judge's chambers and, as in the present case, third parties are sometimes faced with a fait accompli. Very often orders are obtained on a partial and incomplete presentation of the facts, even as they are known to the applicant. In the present matter had notice been given to the trustee, he would have opposed, and successfully opposed, the grant of this commission. The general principle is plain – *audi alteram partem*. ***No order is to be made on any person unless he has been served with notice***. ***Any departure from this rule should be amply safeguarded and scrutinised very carefully before being granted***.

- ***Ex parte Satbel*** (W, 1984): This was an ex parte application in terms of section 311 of Companies Act. The ***draft order*** submitted by the applicant's attorney to court calling a shareholders' meeting to consider the scheme of arrangement under consideration *did not follow standard form*. The Court held that it is ***counsel's duty to draw to the judge's attention any deviations from the standard form orders in the papers and to explain such deviation***. Standard orders exist to facilitate administration of justice and have been carefully crafted for that purpose. In the present case, it was clear that the judge would not have granted the order in form prayed if he was notified of the deviation.
- ***Ex parte Hay Management Consultants*** (W, 2000): While counsel and attorneys may not be expected to read the law reports as they are published and recall their contents or effect, if they have to present argument on a matter the least that is expected of them is to consult the relevant textbooks the consolidated indexes of and noters-up (annotations) to the ordinary law reports and the indexes and noters-up (annotations) in the monthly or weekly law reports which have been published after the effective date of the latest consolidated index and noter-up (annotations), not to mention the computer services that are available to retrieve material. If counsel (and attorneys) do not possess their own copies of the law reports, the Bar library or the Court library can be consulted.

  It is not only in contested cases that counsel has a duty to direct the Court's attention to any relevant authority, but also in uncontested cases. The judge in motion court relies on counsel, especially in ex parte applications and in those cases where there is no appearance for the respondents, to inform the Court of any cases of which the effect may be that they are not entitled to the orders that they seek.

  In the present case, had the judge not sat in a full court decision dealing with the exact point in question (dealing with submission to jurisdiction) which counsel 'could not find', he would have been misled by counsel's ignorance and failure to bring it to his notice and would have granted the order despite the full bench decision being clearly against him doing so.
- ***Toto v Special Investigating Unit*** (E, 2001): It is trite that it is the ***duty of a litigating party's legal representative to inform the court of any matter which is material to the issues before court and of which he is***. The court should *always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the court*. A legal representative who appears in court is ***not a mere agent for his client, but has a duty towards the judiciary to ensure the efficient and fair administration of justice***. The proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the court. As a result of this, ***it has long been regarded as a practitioner's duty to inform the court of a judgment within his knowledge material to the issues, even if such judgment is against the case which he is presenting***: in which latter event ***he can then seek either to argue that it was wrongly decided or to attempt to distinguish it*** from the case being heard. ***For a practitioner to be aware of a judgment adverse to his case and not bring it to the attention of the Court amounts, in my view, to a gross breach of this duty***.

Duty of counsel to observe Bar rules

Case law

- ***Pretoria Balieraad v Beyers*** (T, 1966): The *rules of conduct relating to advocates laid down by the Bar Councils of the Transvaal or of Johannesburg* ***should, as far as is possible and practicable, be upheld by the Court***. In an application for the removal of the respondent's name from the roll of advocates it appeared that the respondent had in many ways failed to observe these rules of conduct. It was accordingly held that the respondent was not a proper person to be allowed to continue to practise as an advocate, and the application was granted.
- ***Olivier v Die Kaapse Balieraad*** (AD, 1972): An advocate whose conduct is the subject of an application for his removal from the roll must of necessity realise that, should it be found that he had told lies, ***his evidence might for that reason be rejected and that this might lead to a finding that he was guilty of the conduct with which he had been charged***. Under such circumstances it is not unfair to say that the advocate must also expect that the Court may ***regard untruthful evidence as an aggravating circumstance*** when the Court has to decide the question what steps should be taken against the advocate.

  In an application by a Bar Council against an advocate the Court, consisting of two Judges, found that the various charges of misconduct of which the advocate was allegedly guilty, had been proved. The Court granted the application and the name of the advocate was removed from the roll of advocates. In an appeal the Appellate Division found, inter alia, that the presiding judge had made it appear several times in the course of the appellant's evidence by means of a question or remark that he had doubts, at least, concerning the truth of some of the appellant's replies and about his credibility in general. On appeal, it was held that there was no doubt that the appellant had given false evidence in various respects. The appellant's ***whole attitude to the Bar and its rules reflected an absence of responsibility, honesty and integrity which ought to characterise an advocate***. He was not prepared to subject himself to the rules and the court is entitled to act against him.
- ***Society of Advocates of SA v Cigler*** (T, 1976): ***The fact that an advocate has breached the Rules of the Society, even in isolated instances, may very well be relevant to the Court's decision as to whether he is a fit and proper person*** to practise as an advocate, and so is a finding whether he treats the Rules of the Society with respect or with contempt. ***Breaches of the Rules may cause an injustice and even an unfair trial***. It is ***for these reasons that Courts have in the past always assisted Societies of Advocates in upholding and enforcing their Rules***.

The independence of counsel

Commentary

- Counsel should at all times maintain his professional independence.
- Although counsel must follow instructions of client, ***the manner in which a case is conducted is the province of counsel***. Counsel must therefore heed his client's instructions (if client wants to testify although counsel may think this is ill-advised, he may have to bow to his client's wishes), but *if the course of conduct that is suggested by the client is so far-fetched, counsel may have to withdraw*.

Case law

- ***R v Matonsi*** (AD, 1958): The appellant had been convicted before a jury of murder. On appeal, it was *contended that the appellant had been prevented by his counsel from giving evidence in his defence*.

  The Court held that ***once a client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not***. Accordingly, ***an accused in a criminal case cannot question his counsel's conduct of the trial and claim relief because counsel 'prevented' him from giving evidence.*** If an accused, in spite of his advocate's advice to the contrary, ***insists on going into the witness box and thereby makes it impossible for his advocate to exercise his legal ability honourably and faithfully as required of him by his office, then the advocate must withdraw from the case rather than act contrary to the express wish of his client***.

Schreiner JA could find ***no Roman Dutch or South African authority which supported the view that the accused in a criminal case can question his counsel's conduct of the trial and claim relief because counsel 'prevented' him from giving evidence***. The English cases show that in general, trials cannot be conducted partly by the client and partly by counsel. Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not.

Cases of disagreement between the views of client and counsel arise from time to time and counsel may find himself between the Scylla of precipitately, and therefore improperly, withdrawing from the case, and the Charybdis of unreasonably overriding his client's will. The decision may be particularly difficult where the accused is being defended on a capital charge by counsel who is acting pro deo without other legal assistance.

But since the appellant in the present case *took no steps to withdraw his counsel's mandate and expressed no disagreement* with the conduct of his case until after the verdict had been given, the trial was regular and the correctness of the verdict could not be challenged. The appeal was dismissed.

- ***Carolus v Saambou Bank*** (SE, 2002): The applicant applied for the rescission of a default judgment granted against him in favour of the respondent bank. The cause of action had been the applicant's failure to make payments due in terms of a mortgage bond. The applicant argued that they had been misled by a representation made by the respondent acting in concert with other banks that the respondent borrowed money from the Reserve Bank to finance their home loans to the applicant; that when the Reserve Bank altered the repo rate, the respondent was obliged to alter its home loan rate correspondingly; and that the increases in the home loan rate were accordingly reasonable and not objectionable. This representation was not true as the respondent did not borrow money from the Reserve Bank to finance home loans. The applicant alleged that he had acted to his prejudice on the strength of the false representation by not objecting to each increase in the home loan rate as it was made. It was alleged further that he had the right to challenge each increase and would have done so but for the misrepresentation because the respondent was entitled to increase the rate unilaterally in terms of the provisions of the bond only if it did so reasonably and not unconscionably. ***The attorney appearing for the applicant had filed an affidavit on the merits of the application deposed to by himself***. On this point, it was held that ***the independence and objectivity of counsel was compromised if he had identified himself with the issues by also being a witness***. ***Proper and desirable practice required practitioners to have and maintain an arm's length association with the merits of matters handled by them***. Normally a court should ***not allow such counsel to continue appearing***. At very least it must get assurance that counsel *will not rely on the affidavit in question*.

Behaviour in court

Technique in litigation

- Counsel ***must exercise the utmost decorum*** in court and show respect for the court.
- CC judgment on contempt of court, per Kriegler:
  - judges must not be too sensitive of criticism;
  - if a *well-articulated criticism on the merits*, then it is ***not*** contempt;
  - if it does ***not*** occur *in the face of the court*, then it must be dealt with by way of *normal criminal proceedings*.
- Two categories of contempt:
  - ***in facie curiae***: contempt *in the face of the court*, then the court has a ***duty to protect its dignity and must be deal with the contempt summarily***. *Judge acts as the prosecutor, witness and judge*.
  - ***ex facie curiae*** (i.e. ***not*** in open court): ***cannot*** be dealt with summarily by a judge, must *follow normal procedures for criminal matters*.
- But ***even unjustifiable words used by a judicial officer will not entitled counsel to retaliate with impunity***. While a judicial officer is expected to behave with as much dignity as those who appear before

him, the fact that he might occasionally fail in those standards will merely create a greater need for restraint, courtesy, and dignity on the part of counsel.

Case law

- ***R v Silber*** (AD, 1952): This was an appeal from a decision of a Provincial Division dismissing an appeal from a conviction and sentence summarily imposed by a magistrate for contempt of court committed in facie curiae following upon an application made by the appellant attorney, on behalf of his client, on the fifteenth day of a criminal trial, to the magistrate to recuse himself on the ground of bias. It appeared that what the appellant had in fact said was that, while in general the magistrate might have had a, possibly deserved, reputation for honesty, he had failed to live up to that reputation in the trial and had given rulings against the defence which he would not have given if he had not been biased. It was held that ***the circumstances showed that what the appellant had said constituted a wilful insult to the magistrate that the appellant had rightly been convicted***. The Court noted that the power to commit summarily for contempt *in facie curiae* is essential to the proper administration of justice. Many forms of contempt require ***prompt and drastic action to preserve the court's dignity and due carrying out of its functions***. To impute bias is a grave insult, but the statutory inquiry is whether it is not merely an insult but a ***wilful insult*** to the magistrate. Every litigant has the right to ask the presiding officer to recuse himself but this right must be ***honestly*** exercised. It must not be a ***cloak for a wilful insulting of the court***.
- ***R v Rosentein*** (T, 1943): The defence counsel *interrupted the prosecutor* when the latter was questioning the accused, and said that the accused did not say the things alleged and that the record was wrong and contained many inaccuracies. The counsel refused to apologise to the court when asked to do so. He was fined for contempt of court. On appeal, it was held that ***two questions had to be answered***: (i) ***was the conduct insulting*** to magistrate; and (ii) was the ***insult wilful***. In respect of (i), the court held the conduct had been insulting to the court because it ***imputed to the magistrate carelessness or incompetence in keeping the record***, and because the alleged inaccuracies in the record had not been drawn attention to in the proper manner. To announce without relevance that record contained inaccuracies was calculated to bring courts into disrespect, and was rightly regarded as “insulting”. In respect of (ii), the insult was “wilful” in that *even if the statement was made the first time* thoughtlessly, on the spur of the moment and without thought as to its nature and effect, ***counsel had persisted in this attitude***. ***By failing to apologise, counsel converted what may have been merely thoughtless into a wilful insult***.
- ***S v Tromp*** (N, 1966): Contempt of court concerns itself ***only*** with ***that conduct which impinges upon the administration of justice*** in or by the courts and ***not*** the part played by the ***Executive*** Government, its officials, employees and servants, save in so far (and then only to that extent) as an ***attack upon or criticism of them imports disrespect of the courts***.

  The Court emphasised, however, that ***contempt of court should not be taken to deny the right of members of the public and the media to embark upon legitimate criticism***. *No wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice*. The path of criticism is a public way: ***the wrong-headed are permitted to err therein provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune***. ***Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men***. The Court also considered certain statements made by counsel for the defence directed at the prosecution, which it held constituted sarcastic, derisive/mocking utterances. However, the Court found *nothing derogatory in these statements, nor anything calculated to bring the administration of justice by or in the courts into disrespect or disrepute*. The State, like any other litigant, must submit to such comments from its opponents. ***He who enters the lists must be prepared to take verbal knocks; a contest in the courts is not to be equated to the proceedings of a young ladies' debating society***.
- ***S v Nel*** (AD, 1991): A presiding Judge or magistrate who is of the opinion that someone has acted in contempt of the court should ***first consider whether it is necessary and desirable for him to take action***. Very often conduct which ***strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly***

conduct of the proceedings. *Too liberal a use of the court's powers to punish persons for contempt can undermine the very reason for the existence of such power*. If a Judge or magistrate *decides that the relevant contemptuous conduct is not of such a nature that it can merely be overlooked*, there are ***two avenues*** open to him. He can ***refer the matter to the Attorney-General to decide whether the person concerned should be prosecuted in the ordinary course***. That will be the obvious choice if it is *not necessary to act more speedily against the person concerned in protection of the reputation or the authority of the court or the maintenance of the orderliness of the proceedings*. On the other hand, if there is such a need ***the Judge or magistrate should there and then attend to it***. If he decides to do this he then ***acts 'summarily', in the wide sense of the word***, against the person concerned, i.e. *in contrast with the ordinary process of law applicable in criminal proceedings*. But in such a case ***he will generally still not act 'summarily' against the person in the narrow sense of the word, i.e. by finding him guilty of contempt without first giving him the opportunity of being heard***. The idea of ***finding someone guilty of a criminal offence without being given an opportunity of making representations in regard thereto is such a drastic deviation from the most fundamental principles of our legal system that it cannot be permitted other than in the most exceptional circumstances***. Although there is *no inflexible rule that a person must first be heard before he can validly be found guilty of contempt* ***it is a salutary point of departure that he be given an opportunity of addressing the court before he be found guilty***. Whether a conviction has been validly entered *without* a prior opportunity for representations having been given depends on the particular circumstances of each case. What will be looked at inter alia is the run***-up to the conduct*** which is contemptuous and the ***nature of the contempt itself***; and in addition thereto it is of importance ***whether the person is a legal practitioner or a layman*** and in the latter case what his *knowledge and experience of court procedures is*.

In the present case the Court found on appeal that the appellant, who had appeared in person in motion proceedings, had correctly been convicted of two counts of contempt of Court in that he had at various times insulted the presiding Judge by accusing him of playing cat and mouse games with him and accusing him of being a coward. The Court held that although the appellant was a layman it was clear that ***not only did he have the intention to insult the Judge but was also fully aware that he was thereby committing contempt of Court***.

Contempt which is committed ***in facie curiae*** is a ***unique offence***; it is a ***distinct procedure whereby the offender can there and then be found guilty and sentenced***; and the ***sentence which is imposed also has unique characteristics***. Someone who commits contempt in facie curiae is ***not an ordinary criminal in the everyday meaning of the word and he ought not to be treated as such***. The reason for the existence of the summary procedure (in the wide sense) in terms of which the offence can immediately be dealt with is ***the necessity that a court, as the axis on which the administration of justice turns, must be in a position to protect its reputation and dignity and to ensure the orderly conduct of its proceedings***. The primary objective of the application of the contempt procedure is to ***maintain the reputation and dignity of the court and the orderliness of its proceedings***. It is to achieve that objective that the court exercises its power to punish the offender. ***The most important function of the imposition of punishment in this case is to enforce the court's authority***. There is ***no room whatsoever for any notion of retribution***. There can also be limited scope for reformation: for the most part (leaving aside exceptional cases) the purpose of the punishment which is imposed is to bring the offender to his senses in the very proceedings in which the offence is committed. Deterrence is by the same token often and chiefly directed at getting the offender to refrain from continuing with his contemptuous conduct in the proceedings which are underway. ***The punishment is not meant to hurt the offender but to bring about an end to the outrage to the court's esteem and authority***. *The extent of the punishment stays in the background; in the foreground is the esteem and authority of the court; and between the one and the other there is no direct relationship*. The authority of the court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it. ***Esteem for the court cannot be achieved by heavier punishments for insults to the court***. ***These considerations indicate why a heavy sentence in these sort of cases is generally inappropriate in the ordinary course of events***. This probably explains why our lower courts were in the past *moderate* in the punishment which they imposed for contempt in facie curiae. That is a salutary practice which deserves encouragement and no good reason exists why the same approach should not be applied in the Supreme Court.

Applications for recusal of presiding officers

Technique in litigation

- Where the basis of an application for recusal is to be a possible bias on the part of the judicial officer, the ***utmost tact*** must be exercised to avoid remarks which might properly be regarded as contemptuous.
- Professional courtesy requires that a judicial officer whose recusal is sought should be ***informed that such an application will be made***. The usual procedure is to request the judge or magistrate to receive both your opponent and yourself in chambers, where you indicate tactfully the fact and grounds of your application.

Interviewing witnesses for the prosecution

Commentary

- In civil cases, ***counsel cannot force a witness to give evidence*** for his client. One can subpoena a witness to testify, but it is hazardous to call a witness who you have not interviewed.
- In civil litigation, ***counsel may interview any witness***. If the witness has *already been interviewed* by the other side, you must *notify the other side before consulting*. They are ***not entitled to refuse the interview, and are not entitled to attend***. It is permissible for the other side to tell the witness that he is not obliged to attend the interview.
- If a witness has *already given evidence* in a trial for the other side, counsel ***may not interview them without the other side's representative being present***, unless they decline to attend.
- In criminal cases, there ***used to be a banket prohibition*** on interviewing State witnesses, unless the prosecutor gave permission for this. This was declared unconstitutional in overturned in ***Shabalala***.
- Following from this judgment, Rule 4.3.2 was formulated. The following propositions can be extracted from it:
  - (a) ***may not interview anybody who you know is likely to a State witness unless you first have permission from the prosecutor***;
  - (b) if prosecutor ***refuses*** permission or give unreasonable conditions, you can ***apply on notice of motion to a court for permission***;
  - (c) if ***unclear*** whether a person is a witness (but it is reasonable to suspect that they may be), then you must ***first get confirmation*** that they are not a witness for the prosecution before consulting;
  - (d) a person is to be regarded as a witness for the prosecution when:
    - (i) someone from whom the ***police have obtained a statement regarding the charge or the events from which the events have ensued***
    - (ii) anyone ***actually called***
    - (iii) person who *was to be called as a witness and then prosecutor changes his mind* is still regarded as a witness.
  - (e) in respect of the rules relating to prosecutors contained in the Uniform Rules of Professional Conduct, it is not clear whether they actually have any binding effect on prosecutors, but these rules are a reflection of the common law. ***A prosecutor must provide access to statements of witnesses and the police docket insofar as it enables an accused to exercise his right to a fair*** **trial.** Prosecutor ***can refuse*** access where:
    - (i) there is a *reasonable risk* that disclosure would lead to the *identify of an informer or state secrets*;
    - (ii) there is a *reasonable risk that disclosure might lead to the intimidation of witnesses*;
    - (iii) otherwise prejudice the proper ends of justice; or
    - (iv) *access is not justified for the purposes of a fair trial*.

Case law

- ***Shabala v Attorney-General, Transvaal*** (CC, 1996): The Court held that the rule of practice pertaining to the right of an accused or his legal representative to consult with witnesses for the State *prohibited such consultation without the permission of the prosecuting authority, in all cases and regardless of the circumstances*, it was ***inconsistent with the Constitution***. An accused person has a ***right to consult a State witness without prior permission of the prosecuting authority in circumstances where his right to a fair trial would be impaired*** if, on the special facts of a particular case, the accused could not properly obtain a fair trial without such consultation. The accused or his legal representative should in such circumstances ***approach the Attorney-General or an official authorised by the Attorney-General for consent to hold such consultation***. If such consent was granted the Attorney-General or such official should be ***entitled to be present*** at such consultation and to ***record what transpires during the consultation***. If the consent of the Attorney-General was ***refused*** the accused should be ***entitled to approach the Court for such permission to consult the relevant witness***. The Court emphasised, however, that this right referred does ***not*** entitle an accused person to compel such consultation with a State witness: (a) if such State witness ***declined*** to be so consulted; or (b) if it was established on behalf of the State that it had ***reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with his evidence or that it might lead to the disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice***. However, *even in the circumstances referred to in (b)*, the Court might, in the circumstances of a particular case, exercise a discretion to ***permit such consultation in the interest of justice*** subject to suitable safeguards.

Legal Privilege

Commentary

- There a two types of privilege which may be applicable to counsel: ***legal professional privilege*** and ***litigation privilege***.
- Legal Professional Privilege. This is a ***common law privilege which applies to prevent disclosure of communications between a client and his legal advisor made for the purpose of obtaining legal advice***. The legal advisor must have been consulted in his ***professional capacity*** and ***in confidence***. The privilege *can only be waived by the client*.
- If there is material in a document which is privileged, but the document is referred to, then the privilege to the confidential/privileged information is deemed to be waived.
- Litigation privilege. This applies directly to counsel, and also to witnesses. It attaches to counsel, not the client (c/f legal professional privilege). ***The general test is that counsel has a degree of latitude even in relation to defamatory material provided that Counsel has no animo iniuriandi***. This applies to statements made in *opening, cross examination, examination in chief, closing and in drafting pleadings and affidavits*. The test that must be applied for qualified privilege is: (1) the ***relevance/pertinence/necessity of the statement***; and
  (2) ***whether there is a foundation*** for making the statement.
- What if counsel is ***reckless to the truth*** of the statement? ***Findlay v Knight*** suggests that ***recklessness to the truth may defeat privilege***. However, ***Joubert v Venter*** suggests that recklessness is ***not sufficient*** to defeat privilege and something more is required, for instance ***malice***.

Case law

- ***Heiman Maasdorp v S I R*** (W, 1968): A person has a common law privilege when consulting his legal adviser that ***his legal adviser will not, without his consent, be permitted to disclose any confidences communicated to him in words or documents in the course of the attorney-client relationship, in court of law or any other tribunal***. This privilege accorded to litigants or possible litigants has been devised by the Courts and is based on public policy. It is part of our common law. The reason for it may be stated briefly as ***being essential for the proper administration of justice so that a litigant may be able to take his legal adviser fully into his confidence and to make full disclosure to him of the circumstances of his case without fear of betrayal***. Furthermore, as a litigant cannot be compelled to give evidence against himself, he must know and be assured that his legal adviser also will not without his

consent be able to give evidence against him in regard to disclosures made in the course of consultation. This well-established rule is to be found throughout our jurisprudence and has repeatedly been described as ***sacrosanct*** and ***inviolate***.

The Court further noted that an attorney ***cannot*** claim privilege in respect of a document which, if it were in the hands of his client, ***client would be obliged to hand over to Inland Revenue***. Nor can he refuse to hand over a memorandum prepared by him for client's use in the conduct of his affairs, for the memorandum would not form part of confidences between the attorney and client.

Finally, the Court held that a taxpayer cannot, by *employing an attorney to do certain things for him which some other person else could equally have done for him*, defeat purpose of section 74 of the Act (dealing with production of documents to the Revenue service) by claiming attorney-client privilege. This is so because the use of an attorney in that instance ***lacks that peculiar confidence between attorney and client which is implicit in the privilege***.

- ***R v Cox*** (UK, 1884): A solicitor was called as a witness in a fraud trial to prove that, *after judgment had been obtained against a partnership, partners consulted that solicitor as to how they could defeat the judgment*. ***The key question was whether communication between attorney and client is privileged where client applies to legal adviser for advice intended to facilitate or to guide client in commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted***.

  Privilege provides that if legal advisers receive a communication or document in their professional capacity from a client that touches on matters within the ordinary scope of their professional employment and for his benefit in the transaction of his business, they are bound not to disclose such information or documents in any court.

  It was held that the present case did ***not*** fall (i) within ***reason*** on which rule rests, or (ii) within its ***express terms***. ***The protection of communications that are criminal themselves or intended to further a criminal purpose cannot be in interests of justice***. Further, communication in furtherance of a criminal purpose ***does not come within the ordinary scope of professional employment of a legal practitioner.***

- ***R v Davies*** (AD, 1956): Legal professional privilege in criminal matters extends only to ***confidential communications***. The Court further noted that the attorney is but the agent of the client to hold the deed; ***if the client is compellable to give up possession, then the attorney is***; if the client is not, then the attorney is not.

- ***S v Kearney*** (AD, 1964): ***A confession made to an attorney is not inadmissible where the person making it was not seeking to obtain legal advice from such attorney***. Professional communications by client to attorney are privileged if they are of a ***confidential character*** and for the ***purpose of obtaining legal advice***. It was held that in the present case, the accused was not a client seeking legal advice from an attorney when he made the confession: he was a former liquidator of the estate in question, a private individual. The attorney's client was the liquidator. There was therefore no attorney-client relationship, since the attorney represented another party; not the accused.

- ***R v Fouche*** (W, 1953): In the course of a trial the defence objected to the prosecution leading evidence of a *statement alleged to have been made by the accused to the witness R, an attorney*. The accused denied having made the statement and at the same time contended that the statement, if made, was one in regard to which R was not competent to give evidence as it was made to him as his attorney. R admitted that the communication was ***confidential*** but said that ***it was made to him as a friend and not as an attorney***. There was evidence that the accused had paid several visits to Johannesburg in connection with an action he had instituted against one K and that *on each occasion he had stayed with R as his guest, and that it was on one of these occasions that the communication was alleged to have been made*. ***It is not every statement made by a client to his attorney that is protected from disclosure***. The communication must be of a ***confidential nature for the purpose of obtaining legal assistance***. The Court found that ***the accused had employed R as his attorney and that he had used the opportunity afforded by his visits to R to discuss the case and to impart information to R as an attorney***. The inference was that the communication objected to, if made, ***was made like other communications in professional confidence*** and that R's evidence failed to rebut that inference. It was therefore held that the statement was protected and R was not competent to give such evidence against the accused.

- ***Joubert v Venter*** (AD, 1985): Our law confers a ***qualified***, albeit very real, ***privilege upon counsel, attorneys, witnesses and litigants in respect of defamatory statements made during legal proceedings***. No distinction should be drawn between a witness testifying verbally who is not a party to an action and one who is. In ***MacGregor v Sayles*** Innes CJ expressed the view that, if a witness makes defamatory statements in the course of legal proceedings, the ***plaintiff*** in an action for damages for defamation had to "... satisfy the Court of three things: First, that the witness was ***actuated by express malice***; secondly, that the words spoken were ***false***; and third, that the witness who uttered them had ***no reasonable grounds for believing them to be true***...". However, the Court held that this is ***not*** a sound approach to the first requirement, viz that the defendant was actuated by "express malice". In principle it would seem ***possible to prove malice by means of extrinsic evidence without necessarily proving all or even any of the other requirements mentioned in the cases***. The first requirement should accordingly be read ***disjunctively*** in relation to the others mentioned. The second requirement in ***MacGregor's*** case, viz proof that the words spoken were ***false***, follows naturally and logically from the very special position of a witness in a court of law. In regard to the third requirement, viz proof that the witness had no reasonable grounds for believing his words to be true, there is no ***doubt that this is indeed a minimum requirement in order to establish liability*** (i.e. apart from the possibility of proving malice). In connection with this requirement, there is much to be said in favour of obliging the plaintiff, in order to defeat the witness' privilege, to go even further and to satisfy the Court that the witness in fact did not believe in the truth of what he said, but this question may also be left open.

  It has also been said that the onus is on the plaintiff to prove, inter alia, that the statement of the witness was "not pertinent to the question put to him". While this cannot be regarded as an independent requirement for establishing liability, ***a litigant who deposes to an affidavit in legal proceedings carries the burden of proving that a defamatory statement made therein was relevant to an issue in the proceedings***. In regard to a witness who testifies orally, two possible approaches concerning the onus in respect of relevance suggest themselves:
  (a) that the *extent of the privilege ought not to vary in accordance with the procedure followed or the manner in which testimony is adduced*; (b) that it may be *inadvisable to whittle away the wide protection afforded a witness giving evidence viva voce by requiring proof of relevance and that provisional protection should be extended to such a witness solely on the ground that he was testifying under oath when he made his statement in issue*. Apart from the question of onus in respect of relevance, it is clear that no difference should be drawn between the extent of the privilege enjoyed by the two classes of witnesses, viz those testifying orally and those deposing to an affidavit.

  As regards the qualified privilege afforded counsel in the conduct of legal proceedings, it has been said that the statement must (a) have been ***pertinent or germane*** to the issue (or, it is preferable to say, an issue in the case) and (b) have ***had some foundation in the evidence or circumstances surrounding the trial***. The ***defendant*** must establish requirement (a) in order to be provisionally protected. Counsel's protection is ***not*** confined to the opening addresses, the examination of witnesses, cross-examination and addresses to the Court, but also extends to pleadings drafted by him and "other documents necessary to place his client's case before the Court". This last category is clearly wide enough to *include affidavits settled or prepared for motion proceedings*. While counsel who drafts a pleading or affidavit on the instructions of an attorney is in a stronger position than the attorney, since ***counsel presumes that the matter has been sifted and that proof will be forthcoming***, the position of counsel who accepts a brief to consult with witnesses and thereafter to draft pleadings or affidavits can, in principle, not differ from that of an attorney who acts on the instructions of his client.

  With reference to the second of the requirements posed immediately above, it is true that in particular circumstances it may be required of a defendant pleading privilege to prove that he had reasonable grounds for making the defamatory statement, but this is certainly ***not*** a rule of universal application. ***The incidence of the onus in the present context falls to be determined by considerations of policy, and what is of paramount and decisive importance is that the welfare of society demands that an advocate or attorney who pleads the cause of his client should have a large degree of freedom*** in laying his client's case before the Court, even though in so doing he defames the other party or even a third party. To give due effect to these considerations it is necessary to lay down that the ***privilege which counsel enjoys***

(and thus the provisional protection afforded thereby) is established on proof that the statement in question was relevant or germane to an issue in the legal proceedings in the course of which it was made, and that it is ***then for the plaintiff to prove that the defendant abused the occasion*** (and thus forfeited the protection of the privilege). The plaintiff can do this by, for instance, proving that the defendant ***did not have "some foundation" in the evidence or surrounding circumstances for making the statement***. There are, of course, other ways of defeating the claim of privilege, such as proof that the defendant was actuated by ***malice*** in the sense of an improper or indirect motive.

As regards the relevance or otherwise of ***counsel's belief in the truth of the statement*** made by him, expressions can be found in some of the cases suggesting that *an absence of (reasonable) grounds for believing in the truth of a statement is sufficient to attract liability*. This is ***not*** a correct reflection of the law. In order to be afforded protection, ***counsel need not believe in the truth of the statement*** and accordingly the absence of grounds for such belief is, per se, inconclusive. ***The absence of a subjective belief on the part of counsel in the truth of the statement does not defeat the privilege***.

Conflict between the interests of two clients

Commentary

- Counsel must be able to act fearlessly in the interests of his own client to the exclusion of all others. This duty can be compromised if counsel represents two or more parties in the same litigation.
- See GCB rules 4.11; 2.6 (improper to accept a brief if it would be embarrassing or prejudicial to a client) and 3.5.1 (counsel is not to become personally associated with a client's cause).
- In criminal cases, counsel is ***not be able to represent either accused if either/both have provided counsel with information in confidence about the other***. This is because counsel will ***not be able to cross-examine each of them by putting the version of the other given that he has acted for both of them up until that point***.
- If one of the accused is under cross examination, one ***need the permission of the*** judge is withdraw.
- If a conflict between to client arises in a criminal trial:
  - (1) ask for adjournment
  - (2) confirm with chair of bar council
  - (3) explain to accused 1 why withdraw
  - (4) ask permission from judge to speak to accused 2 even though still under cross-examination; explain to accused 2 why withdraw
  - (5) advise instructing attorney that his position also untenable
  - (6) ask for matter to stand down so that instructing attorney can arrange for two other attorneys and counsel to take over
  - (7) withdraw from the matter – very short explanation required.

Case law

- ***S v Jacobs*** (E, 1970): When the case began, the two accused were defended by the same attorney. During the of trial, it became apparent that there was a conflict in the defence of the two accused. The attorney did not clarify his position, nor withdraw. Both accused were convicted; but their convictions were set aside on appeal convictions set aside. The Court held that when the conflict came to the fore, the attorney should have clarified his position and should have withdrawn from defence of one accused, allowing himself to continue to represent the other.
- ***S v Naidoo*** (AD, 1974): It was contended on appeal that the trial was vitiated by an irregularity in that the accused were ***prevented from cross-examining their co-accused because they were all represented by the same counsel***. It was argued on behalf of the State that *counsel was in control of the proceedings and the appellants could therefore not complain about his failure to cross-examine* any of the other appellants on behalf of the other appellant. This argument was ***rejected*** on the basis that the decisions relied upon by the State in this regard wee instances where *counsel was representing only one client and had taken a decision which he conceived to be in the interests of his client*. In the present case ***counsel***

was precluded altogether from cross-examining any one of the appellants each one of them being his own client. The appellants could also not themselves have cross-examined their co-accused while being represented by the same counsel. ***Short of withdrawing counsel's mandate, a step which they as laymen could hardly have been expected to take, there was no possibility for them to exercise their undoubted right to cross-examine*** any witness testifying at the trial at the instance of the State or a co-accused electing to give evidence on his own behalf or a witness called by a co-accused.

- ***S v Moseli*** (O, 1969): Two accused were represented by the same pro deo counsel, on basis that their evidence was a consistent denial. However, when accused 2 entered the witness box, he blamed accused 1 for the offence. The court will ***not allow the same counsel to defend two co-accused with material conflicting interests***, ***nor to continue to defend one of them***, irrespective of his attitude, after such interests have come to light. If accused refuses to inform his counsel of the evidence he proposes to give, especially where the advocate is defending two accused, ***counsel is placed in an impossible position and may withdraw forthwith from defence of the accused***. Counsel was given leave to withdraw and ordered that two other counsel be appointed.

Duty of counsel acting as prosecutor to disclose a statement made by a witness which contradicts the evidence given by him

Case law

- ***R v Steyn*** (AD, 1954): The Court held that where there is a ***serious discrepancy between the statements of a prosecution witness and what he says on oath at the trial, the prosecutor must direct attention to that fact*** and, unless there is special and cogent reason to the contrary, ***make the statement available*** for cross-examination. The proscecutor stands in a *special relationship* to the Court.
- ***S v Radebe*** (AD, 1973): With reference to the rule in ***Steyn***, the Court held that the contradiction between the witness's statement and his testimony in the present case was not such as to place duty on the prosecutor to bring the court's attention to the inconsistency. In addition, it was held that if the accused has admitted the elements of the offence which are at issue in the witness statement, the statement need not be made available because the defence will not be able to cross-examine the state witness on the elements, the accused having admitted them. Even if the defence counsel had had the witness, he was not be entitled to cross-examine the witness thereon because the accused had confessed to the crime. Counsel for defence must have known what the evidence of the witness would be, and therefore could not have put it to the witness that his evidence was untrue.

Disclosures on application for admission to the Bar

Commentary

- In applications for admission, the principles relating to ***ex parte*** applications apply. The ***applicant bears the onus of proving that he is a fit and proper person*** to practise as an advocate.
- The rationale for a stringent duty of disclosure in admission applications is that by failing to make such disclosure, the applicant demonstrates that he is untrustworthy and/or that he is not a fit and proper person.

Case law

- ***Ex parte Cassim*** (T, 1970): In an application for admission as an advocate the applicant *failed to disclose in his application the fact that he had been convicted of assault and defacing Post Office property*. On his informing counsel thereof, however, this was communicated to the Court and a postponement granted. On resumption of the application, it was held that *the offences themselves did not indicate that the applicant was guilty of dishonest, disgraceful or dishonourable conduct*. However, the ***offences were material and relevant and the main difficulty with which the Court was faced was the applicant's failure to disclose them in the original petition***. The profession of advocates ***requires the utmost good faith from all practitioners and aspirant practitioner***s. It is the duty of all legal practitioners and aspirant practitioners not to incite persons to commit breaches of the law and it is also their duty to ***administer and***

to further the administration of justice. However, it was held that *it could not be said that it had not been shown on a balance of probabilities that applicant was a fit and proper person*. The application was granted.

- ***Ex parte Singh*** (N, 1964): In an application for the applicant's admission as an attorney the Law Society drew the Court's attention to the fact that the applicant had twice in one afternoon been fined by a magistrate for contempt of court. *No mention of these incidents had been made by either the applicant or by his principal*. The applicant's conviction had been brought on review and appeal and judgment had been reserved. It was held that the Court should have been informed by the applicant and his principal of these incidents. It was ordered that the *application be postponed* to await the outcome of the reserved judgment, and the applicant and the principal were ***ordered to file an affidavit explaining their failure to mention the incidents***.
- ***Ex parte Maharaj*** (N, 1959): In his application for admission as an attorney, it appeared that in 1954 the applicant, *when sitting for one of the examinations, was found in possession of a note-book relating to the subject of that particular examination and as a result the Joint Committee of Professional Examinations cancelled the result of his examination and debarred him from taking the examination again before the end of 1956*. In his application for admission, the ***Law Society sought to cross-examine him in order to test the truth of the explanation given for the incident***. ***The Court was satisfied that it had the power to order such cross-examination***. The object of that cross-examination would be to test the truth of the explanation which the applicant gave at the time for his possession of a note-book. He said that it was entirely inadvertent, and that though he was warned of the results which would follow from having books or papers in his possession, he was completely unaware of the fact that the note-book was in his pocket. There are difficulties about that explanation. He says that he discovered it when he put his hand into his pocket in order to find a sweet. He then removed it from that pocket with the intention of placing it in another pocket where it would not so easily be seen by the invigilator. In fact it was found under his examination paper. ***The Court was not satisfied that the justice of the case required that the Court should now enter into an investigation as to whether the applicant did not contravene a more serious rule than the one on which he was charged and convicted***. ***The Court had prima facie evidence of the applicant's fitness for admission, and no good cause would be served in enquiring at this stage whether the applicant was actuated by a dishonest motive five years ago***, or whether he has given an explanation of the incident which is not a true one. For these reasons the Court granted the application for admission, but added that these proceedings ought to be a lesson to the applicant of the ***importance of a member of an honourable profession avoiding at all times even the suspicion of dishonesty or untruthfulness***.

- ***Ex parte Gunguluza*** (N, 1971): The Court held that ***a person cheating in a professional examination is not a fit and proper person for admission to that profession***. In his application for admission as an attorney it appeared that he had cheated during the practice examination. The *established fact that the applicant cheated in that examination shows prima facie that he was then not a fit and proper person to be an attorney*. The conduct of the applicant since this unfortunate incident ***suggested that he may well have, and probably has, repented of his lack of integrity on that occasion, and it may well be that the proper course is to encourage him to continue in the path of righteousness and integrity***. The Court stressed that ***a person cheating in a professional examination is not a fit and proper person for admission to that profession***. The Court will scrutinise the facts ***to see if a fall from grace of this kind has ceased in a manner which assures the Court that the applicant is, at the time of his application, a fit and proper person***. In this scrutiny the Court should adopt a somewhat *similar approach to that employed where an attorney, who has been struck off the roll, has applied for his re-admission contending that his subsequent conduct gives an assurance that the previously existing lack of fitness has ceased*. The Court, on consideration of all the facts as disclosed, admitted the applicant but delayed his effective entry by postponing the taking of the requisite oath of office and loyalty to a future date.
- ***In re Rome*** (AD, 1991): Section 3(1)(d) of the Admission of Advocates Act requires an applicant for admission as an advocate 'who has at any time been admitted to practise as an attorney in any Court in the Republic or elsewhere' to satisfy the Court that his or her name has been ***removed from the roll of attorneys*** on his or her own application. The term 'attorney' as used in s 3(1)(d) means a ***legal practitioner***

practising as an attorney in South Africa under the system of a divided Bar, as it is known in South Africa, or practising elsewhere and ***doing substantially the work of an attorney, as known in this country, under a similar system of a divided Bar***. In the USA, ***the Bar is undivided and an attorney and counsellor at law is entitled to and may in fact perform the functions and undertake the work of both advocate and attorney in the South African sense***. It follows that ***such a practitioner is not an 'attorney' for the purposes of s 3(1)(d)***. The Court accordingly held that the appellant's status as an attorney and counsellor at law in certain courts of the State of New York in the USA did ***not*** constitute her an 'attorney' for the purposes of s 3(1)(d) of the Act and that she therefore did not, in her application for admission as an advocate, have to meet the requirements of that subsection.

Fit and proper person to practise

Case law

- ***Fine v Society of Advocates*** (AD, 1983): Section 7 (1) (d) of the Admission of Advocates Act provides that, in disciplinary proceedings against an advocate, a Court must first decide whether or not the advocate whose conduct is under review is a ***fit and proper person*** to continue to practise as such; and secondly, if he is *not*, to ***decide whether to suspend him from practice or order his name to be struck from the roll***. The first of these matters ***must be decided on a balance of probabilities, and the Appellate Division, on appeal, will investigate whether or not the finding of the Court a quo was correct and will set it aside if it is not***. *However*, the ***second matter*** (i.e. whether the advocate should be suspended from practice or should have his name struck from the roll) is ***one for the Court a quo to decide in the exercise of its discretion, and the Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make***.

  The appellant had been removed from the roll of advocates by the Court a quo upon disciplinary proceedings instituted against him by the respondent Society. It appeared that the appellant had signed a lease in respect of certain property on behalf of a foreign lessee and, in terms of a clause in the lease requiring him to provide the lessor with a letter to the effect that sufficient funds to cover the rental for the initial period of six months of the lease had been lodged with him, sent a letter in the aforementioned terms to the lessee. The letter was to the ***appellant's knowledge false***. In addition, by so acting the appellant was acting in contravention of a rule of the Professional Regulations of the respondent Society which prohibited a member of the Bar from practising as an advocate *"while actively engaged in the carrying on of any other professional or commercial or industrial undertaking".* The Court a quo had held that the appellant was not a fit and proper person to continue practising as an advocate and ordered his name to be removed from the roll.

  On appeal, it was held that ***the Court a quo was correct in concluding that the appellant was not a fit and proper person to continue practising as an advocate***: the letter sent to the lessor of the premises was undoubtedly fraudulent; it was not an impulsive and ill-considered act and the inference was clear that the lessor was prepared to accept the appellant's assurance that he was holding the lessee's funds because he was a practising advocate. In addition it was clear that the appellant was in breach of the aforementioned rule of the respondent Society. It was further held that there were ***no grounds upon which the Court on appeal could interfere with the decision to strike the appellant's name off the roll of advocates***. The appeal was dismissed.

- ***Hayes v Bar Council*** (Zim, 1981): The ***onus is on the applicant to establish that he is a fit and proper person to be admitted as an advocate***. The question whether he is or ***not*** is one to be decided as an ***objective question of fact, not as a matter of discretion by the trial Court***. In the end it comes back to it being the duty of the Court to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, looking to the character and position of the persons to ensure that suitors are not exposed to improper officers of the Court. ***This does not mean that it is the task of the Court to assess the professional competence of a person who shows that he has the necessary qualifications, but it can take into account his previous conduct in relation to the Courts and his expressed attitudes to the Courts if these are relevant to the way he may perform his duties on behalf of those he may represent***. In addition ***the profession of advocate and attorney requires the***

utmost good faith from practitioners and from all aspirant practitioners. An advocate, whose main duty it will be to represent his clients before the Court, must be a person in whose reliability and integrity the Courts must be able to place complete trust, it always being remembered that an ***advocate owes a duty at least as much to the Court as to his client***. And the Court must be ***satisfied that he will not by his behaviour do anything to bring the Courts or the profession into disrepute***.

The general principle to be applied is to ensure that suitors before the Courts are not exposed to improper officers of the Court. It is necessary to bear in mind that officers of the Court are entrusted to exercise important functions and occasionally grave responsibilities. Citizens whose affairs require them to come to Court as suitors require and are entitled to advice that is both careful and impartial, and that is dispassionately weighed up and given. This in turn ***requires in an officer of the Court at least some real capacity for taking a detached view of cases in which he is involved***, i.e. that, in a conflict situation as will arise in most litigation, he will retain, at some point prior to advising or acting, an ability to ***control his own feelings and not let them intrude into or colour his judgment and reactions***.

In the present case, the appellant, after a distinguished and varied scholastic period in subjects other than law as such, had had a *chequered career, in various parts of the world*. He had come to what was then Rhodesia in 1972 and had been an accountant until he left to go farming. This project led in 1975 to the liquidation of the company which he was operating and to the sequestration of his estate. These proceedings, in turn, led to a number of cases before the Courts in which he ***unsuccessfully appeared for himself and was involved in numerous altercations with the Bench and officials of the Court in the course of which he had adopted a wholly irresponsible attitude to the Court before which he now wished to practise***. In 1978 he had been rehabilitated on generous terms despite a significant deficit. Finally he had qualified as an advocate. His admission had been opposed by the respondent and refused by the trial Court. In an appeal the Court found that, ***in endeavouring to explain away his past conduct, he had been lacking in frankness in a number of respects***, and, on an analysis of his conduct as a whole, and on an application thereto of the above principles, the majority of the Court confirmed the decision of the trial Court and dismissed his appeal.

- ***Society of Advocates v Merret*** (N, 1997): In a consolidated application the first applicant sought an order in terms of s 5(1) of the Right of Appearance in Courts Act for the withdrawal of the respondent's rights of appearance in the High Court; and the second applicant, the Natal Law Society, applied for an order that the respondent's name be struck off the roll of attorneys, notaries and conveyancers. Both applications were based on allegations to the effect that ***in a divorce action the respondent had deliberately misled the Court***, and was therefore not a fit and proper person to appear in the High Court or to practise as an attorney. The respondent, who had acted for the plaintiff in a divorce action, had at the hearing, when asked by the presiding Judge whether the attorneys representing the defendant knew that the matter was proceeding that day on an unopposed basis, ***replied that they knew that the respondent was proceeding and that they had not filed an appearance. It was not disputed that the respondent had misled the Court, but he denied having done so deliberately or dishonestly***.

  The Court was satisfied that the respondent's evidence regarding his understanding of the Judge's question, and his alleged belief that the defendant's attorney had known that the matter was proceeding that day, had been ***deliberately untruthful***. Accordingly, the respondent was ***not a fit and proper person*** to have the right to appear in the High Court or to remain on the roll of attorney. After his performance before the Judge at the hearing of the divorce action, ***the Court could never implicitly trust in or believe what the respondent told the Court from the Bar, notwithstanding his protestations that he had learnt his lesson*** and would never repeat what he had chosen to call his 'error'. The requirement that advocates should be honest and truthful in their dealings with each other and the Court applied equally to attorneys and that in view of the respondent's demonstrable lack of integrity his name had to be struck from the roll of attorneys. The Court referred to ***Ex parte Swain***, in which it was held that ***the appellant's lack of truthfulness, apart from anything else, is a fatal barrier to his admission as an advocate*** (and the same should apply to applications for removal).

Pro Deo counsel

Case law

- ***S v Gibson*** (D, 1979): This was a case of contempt against newspaper because it reported that ***pro Deo counsel were inadequate*** for political trials because they did not have appropriate qualifications. The Court held there are at least ***three elements*** to the offence of contempt: (1) it is a crime of ***intention***; (2) it is a crime which ***relates to the administration of justice in the Courts*** and not the administration of justice generally; and (3) it is *designed to prevent or punish violations of the dignity or authority of the Courts* and ***not mere criticism of the administration of justice***. ***Justice is not a cloistered virtue***.

  Crucially, the Court noted that article did ***not*** state *expressly or by implication* that pro Deo counsel are *appointed by the court*. The article does ***not*** state that the court permits inadequate and improperly qualified counsel to defend accused persons in terrorism trials and similar cases. It is not even stated that the courts know that the counsel who appear pro Deo in such cases are inadequately and improperly qualified.

  Whatever the legal theory, in practice, ***pro Deo counsel are appointed by the Bar Council*** or Bar Council committee and not by the court. In a dock defence (an English concept which may mean same thing as pro Deo) it is the accused who makes a selection of counsel from amongst barristers actually sitting in the court. In the South African context, pro Deo means that ***counsel is not paid by the accused, but they are paid a fee, refresher and travelling expenses by the State***. The Court noted that pro Deo counsel are ***invariably the most junior members of the Bar*** and have the least experience. It often takes an alert judge to see that justice is done. The Court held that it is an ***anomaly that the most serious capital cases are defended by the most inexperienced counsel***.

  Whatever the correct juridical nature of the appointment of pro Deo counsel, it is clear (a) that pro Deo counsel are, in practice, almost invariably appointed by a member of the Bar and not by the Court and (b) that it has ***not*** *been established that anyone who read the article in question is likely to have thought that pro Deo counsel were, in practice, actually appointed by the Courts, or by a Judge or Judges*. Most of the readers of the article would not, in all probability, have applied their minds to the question as to who appoints pro Deo counsel. The Court took the view that one searches the article in vain for any criticism of the Supreme Court or indeed any Court.

  Rather, the article said that Prof Dugard says that pro Deo counsel "was inadequate for political trials". It says that he holds this view because pro Deo lawyers did not have the appropriate qualifications. It is obvious that it is suggested by Prof Dugard that pro Deo counsel are inadequate for political trials because they do not have appropriate qualifications for such trials. The statement is not that pro Deo counsel are always inadequate but that they are inadequate "for political trials". It is undoubtedly so that ***pro Deo counsel are usually the most junior members of the Bar are those with the least experience***. The Courts do not, of course, permit persons to appear before them as counsel who are not duly qualified and admitted as such. All those who are so qualified and admitted have a right of audience whether the Court regards all of them as competent or not. Nevertheless there is a *great diversity of natural ability and skill between practitioners of the laws*, and in the case where a wholly inexperienced advocate is also a person who lacks, in large measure, most of the qualities necessary to a good advocate, it requires an extremely alert Judge to see that justice is done and that there are not miscarriages of justice as a result of inexperience or inability or a combination of both. Having said that, ***the judge makes it absolutely clear that the system of appointing pro Deo counsel is an indispensable part of the proper administration of justice***. In most cases it is obvious that *representation by a man who has obtained the qualifications necessary to admit him to the Bar is certainly better than no representation at all*. In some cases pro Deo counsel is a highly skilled and experienced person. Ideally, of course, more experienced and able persons should defend persons who are exposed to the death penalty. In fact it is a serious anomaly that such cases are usually defended by counsel with the least experience, for, although the law in these cases is seldom complex, errors of judgment in handling evidence could have fatal results for the accused. There are no doubt ***considerable practical problems*** involved in implementing an ideal situation, not the least of these being the considerable ***financial burden that this would impose upon the State***. It would seem to be a matter which should be further considered by all the authorities and bodies concerned. A *possible solution which I mention with great diffidence for consideration might be for the State to fix some sort of*

grading of fees and to pay a fee for which it would be reasonable to expect fairly able and experienced counsel to appear in the most serious of what are all serious cases. The system we have, however, may in fact be the best that is available in the circumstances, and it may be difficult under prevailing conditions to improve upon it.

The Court held that the notion that pro Deo counsel would be deterred from doing their duty with proper zeal and confidence because an article in a newspaper, no matter how influential, had quoted a university professor, no matter how distinguished, as saying that pro Deo counsel were inadequate for political trials because they did not have the appropriate qualifications, needs only to be stated to be rejected. *Such an article is not capable of inhibiting counsel from undertaking pro Deo defences*, still less can it be regarded as being calculated or likely to do so. In this regard, it is relevant that ***the Bar is not a profession of shrinking violets***. It is ***part of the cut and thrust of general practice to encounter sarcastic, sneering and sometimes even insulting or humiliating language from one's opponent or litigants***.

On the charge of contempt of court the Court found that the State had failed to establish any of the three essential features of the charge as set out above. As to the charge of defamation, the Court found that the article was defamatory of a particular counsel who had appeared pro Deo, but that the charge failed as he had been neither named nor was there any evidence of anybody who knew him understanding the words to refer to him. The accused were acquitted.

General misconduct

Commentary

- There are *many forms* of misconduct, ***not simply contempt of Bar Rules***.
- ***Includes misconduct in professional or private life*** which is so serious that it *impacts on the reliance and trust which the court places on counsel's word*. Such conduct be sufficient for the removal of an advocate's name from the roll.

Case law

- ***Algemene Balieraad van Suid-Afrika v Burger*** (T, 1993): By the enactment of the Admission of Advocates Act the Legislature *expressly met the need of the Court, in exercising its supervision of advocates, to have somebody to place information and evidential material before it in disciplinary proceedings*. This was done by ***conferring the right on the General Council of the Bar of South Africa, as well as on any society of advocates in the division of the Supreme Court in which the advocate concerned practises, to launch an application for the removal of the advocate's name from the roll of advocates***. It is ***not*** relevant, for this purpose, whether the *General Council of the Bar or the society of advocates has the power in terms of its constitution to take such an original disciplinary step*. ***Section 7(2) of the Admission of Advocates Act confers that power***.

  Although, in the case of an advocate acting as junior to a senior advocate, ***fees are primarily fixed by the senior, where the junior knows or should know that the fees fixed by the senior are so unreasonable as to be indefensible, it is the duty of the junior to fix a reasonable fee*** for himself or to seek guidance from a senior advocate or from the chairman of the Bar Council. It is the ***duty of an instructing attorney, when fees marked by counsel are conspicuously higher than those normally marked, to object to such fees or at least to debate the matter with counsel***. ***The fact that an advocate's instructing attorney is satisfied with a fee marked by counsel is little or no excuse for or mitigation of misconduct by such advocate in the form of flagrantly excessive fees***. It would be more accurate to say that *the advocate has misused the attitude of the attorney who had, to the knowledge of the advocate, not fulfilled his duty*. The fact that case was of ***great importance to client justified, at most, a moderate increase in counsel's normal rate***, not three times the normal rate as counsel charged in the present case. Compounding the matter was that counsel had previous infractions, which showed that he had a lack of responsibility and integrity and a disdain for the Rules. He was struck off and his junior was suspended for 6 months.
- ***Society of Advocates v Z*** (N, 1988): The applicant had sought an order in terms of s 7(1)(d) of the Admission of Advocates Act, striking respondent off the roll of advocates, and alternatively, suspending him from practice as an advocate for an appropriate period. The conduct of the respondent which the applicant

complained of as falling short of the standards of behaviour to be expected of an advocate revolved mainly around the trading history and subsequent demise of a business, F Motors. All the incidents concerned ***extra-professional behaviour*** by the respondent and the Court remarked that ***although there was some distinction to be drawn between extra-professional activities and the respondent's conduct within the profession, regard could be had to the former as shedding light on the character and integrity of respondent*** and that, in deciding whether or not any particular action is morally reprehensible, ***it should be borne in mind that as far as actions are concerned which take place in the particular context of a business community, the standards of that community must colour the conduct and may in certain circumstances*** explain conduct but not excuse it against the background that the conduct is that of an officer of the Court. The first incident concerned one E, employed by F Motors, who wished to commence business as a second-hand car dealer whilst still in the employ of F Motors. It was agreed between respondent and E that respondent would obtain premises from which the business could be conducted and would undertake the licensing application as a front for E. On being questioned by the licensing officer, *the respondent indicated that he was the sole owner of the business and that a certain V would manage the trading concern*. The second incident related to a vehicle owned by D Motors which was damaged in a collision and for which damages one P orally accepted responsibility. As P was tardy in fulfilling his undertaking, *respondent wrote a letter to him on the letterhead of his chambers, stating that he was a partner in F Motors and that the latter looked forward to receiving the amount in issue within 14 days*. Under his signature appeared the legend 'Advocate J van Z'.

It was held that the ***respondent's misleading evidence before the licensing officer, bearing in mind that he was at that time an officer of the Court, constituted disreputable conduct***. As regards the second incident, it was held that respondent had ***misused his professional designation*** in this regard - he was ***in effect performing a service for F Motors without the intervention of an attorney and in this regard his conduct fell substantially short of that to be expected of a responsible and proper member of the Bar***.

However, it was held that these findings did ***not*** merit respondent being struck off the roll as (a) there had been ***no complaint against respondent's conduct*** in the long period following these incidents; (b) the ***conduct in question was not conduct within the profession itself but associated with another activity altogether*** and (c) there did ***not appear to have been any real prejudice to anyone***. The Court therefore ordered respondent's suspension from practice for one year.

- ***General Council of the Bar v Matthys*** (E, 2002): The respondent was an advocate and member of the ***Independent Association of Advocates of South Africa*** (IAASA), which was ***not affiliated to the GCB***. The applicant applied for an order in terms of s 7(1)(d) of the Admission of Advocates Act that the respondent's name be struck from the roll of advocates. The relevant section provided that the Court could, upon application, *suspend any person from practice as an advocate or order the name of any person to be struck off the roll of advocates if the Court was satisfied that such person was not a fit and proper person to continue to practise as an advocate*.

  The applicant's papers alleged a number of complaints regarding the conduct of the respondent. The respondent was charged with *lying* to and/or *misleading courts* and/or presiding officers; *failing to comply with the duty owed to a client to prepare properly and fully for the presentation of the client's case* and to act in the best interests of the client; *failing to appear on various dates before a presiding officer, either at all or timeously*, in a criminal matter in which he was representing the accused; failing to appear before a regional court on dates to which matters in which he was appearing had been postponed; accepting clashing briefs; *failing to return a deposit paid by a client after the termination of the mandate* and *non-performance of the services in respect of which the deposit had been paid*; and *accepting instructions from a member of the public without the intervention of an attorney*. The respondent ***largely admitted that he had conducted himself in the manner alleged by the applicant***. In cases where he admitted misconduct, he tendered an apology and, in most cases, an explanation for his conduct.

  The Court held that the proceedings in the instant matter were ***not ordinary civil proceedings***, but ***sui generis*** in nature. They were proceedings of a disciplinary nature of the Court itself, not those of the parties, ***with the Court exercising its inherent right to control and discipline practitioners who practise within its jurisdiction***. The applicant, in bringing the application, ***acted as the custos morum of***

the profession in the interests of the Court, the public at large and the profession, its role being to bring evidence of the practitioner's misconduct before the Court in order for the latter to exercise its disciplinary powers.

It had to be decided (1) ***whether the offending conduct had been established*** on a preponderance of probabilities and, (2) if so, ***whether the person was a fit and proper person*** to practise as an advocate. The latter finding to some degree involved a ***value judgment*** but was in essence one of making an ***objective finding of fact***. ***Discretion did not enter the picture***. However, once there was a *finding that the respondent was not a fit and proper person* to practise, he could, ***in the Court's discretion***, *either be suspended or struck off the roll*. It was permissible to have regard to the ***totality of the respondent's conduct and the cumulative effect*** thereof in arriving at a decision. When assessing the effect that the respondent's conduct had on the question of whether he was a fit and proper person to practise as an advocate, it was ***permissible to have regard to the explanations tendered by the respondent*** for his conduct, either to the applicant when it had called for an explanation for his conduct or in the papers filed by the respondent in the application.

It was held that after considering the evidence and explanations tendered, it was an *unavoidable conclusion that the respondent had misled the courts and/or presiding officers as alleged, and had done so deliberately.* In the circumstances it could ***not be said with confidence that the respondent would not lie to, or mislead, a Court, or be party to a client of his doing so in the future***. Such conduct was deserving of ***severe censure*** and it had to be concluded that the respondent was ***not a fit and proper person*** to practise as an advocate.

Further, in failing to comply with the *duty owed to a client to prepare properly and fully for the presentation of the client's case and to act in the best interests of the client*, the ***conduct of the respondent reflected such a fundamental breach of the duty*** which a practitioner owed to his client and such a ***grave dereliction of duty*** that *no other conclusion was possible but that the respondent was unfit to practise as an advocate*. The conduct of the respondent in failing to appear in court on designated dates or arriving late without adequate explanation was *not only* ***disruptive, if not subversive, of the administration of justice, but also constituted extreme discourtesy and a disservice to the court***, the prosecutor, the client and the witnesses involved, and was ***contemptuous of the court***. The conduct had been aggravated by the respondent's ***failure to apologise*** to the court or explain his absence. This, also, was ***extremely discourteous and reflected an attitude towards the court that could not be countenanced***.

It was further held that ***the rule against an advocate accepting clashing briefs was a time-honoured and fundamental one***.

The respondent's conduct in accepting instructions from, and performing services for, a client ***without the intervention of an attorney*** had to be found to have been *unprofessional*.

As to the respondent's intimations of remorse, while remorse, *if genuine, was a mitigating feature*, the nature of and circumstances surrounding the transgressions established against a practitioner might nevertheless be such that he merited the severest censure the Court could impose. The present was such a case. Furthermore, the genuineness of the respondent's professed remorse was somewhat tainted by the feature that *even in the instant proceedings the respondent had not been completely frank and open with the Court*.

It was accordingly held that the respondent was *not a fit and proper person* to practise as an advocate and was disbarred.

- ***General Council of the Bar v Geach*** (SCA, 2013): In issue in this case was whether a high court correctly exercised its powers under s 7 of the Admission of Advocates Act to suspend certain advocates from practice and to strike others from the roll, and also whether it had been *competent for the court to order the advocates to repay moneys to the Road Accident Fund*. The facts were that the advocates had ***accepted multiple briefs to conduct trials on the same day*** against the Road Accident Fund and in each case had charged a ***full trial fee***. The relevant society of advocates had disciplined them and applied to a high court for it to note the sanctions imposed. Ultimately the high court, exercising its powers under s 7 of the Act and its inherent powers, suspended a first group of the advocates and ordered that they repay moneys to the Fund; and struck a second group from the roll and ordered them also to repay moneys. The General

Council of the Bar (the GCB) appealed the high court's findings in respect of the first group, contending that *they ought to have been struck from the roll*; and the *advocates in the second group appealed the high court's orders striking them off, as well as the orders of repayment*.

There were three stages in the enquiry into whether such action should be taken. First, ***whether the impugned conduct had been established***; second, ***whether the individual was fit and proper*** to continue to practise; and third, ***whether the individual was to be removed from the roll or suspended***. Only the high court's findings on the third stage were the subject of the appeal. The exercise of this discretion involved *two enquiries*: the first was to ***establish the material facts***, and the second was to ***evaluate those facts towards the correct objective***. Only if the court had ***incorrectly conducted these enquiries could a court of appeal interfere with its decision***.

In this case the end to which the high court had conducted its enquiry was the ***protection of the public***. The SCA noted that once an ***advocate had exhibited dishonesty it might be inferred that the dishonesty would recur and for that reason he ought ordinarily to be barred from practice***. Only in exceptional circumstances would this inference not need to be drawn and striking off not need to follow. The exception could be expressed in the distinction of a *'character defect*' as against a *'moral lapse*'. Applying this law to the high court's treatment of the cases of the *first group* of advocates, *the SCA held that the high court had been alert to the above distinction and had directed its enquiry to whether the cases were the exception*. It had also proceeded from a correct appreciation of the facts and had directed its enquiry toward answering the correct question. Having done so it was *difficult to see how the appellants could suggest that the enquiry was misdirected*. The complaint appeared to be that the high court ought to have ***evaluated the facts differently, which was not a ground on which the SCA could interfere with the decision***. The court a quo went about it on the correct facts, and on a correct construction of the law, and the *rest fell within its discretion*. Perhaps the acid test is ***whether its conclusions could not have been reached by a reasonable court***. Whether or not the SCA agreed with the court a quo, it could not be said that the decision was unreasonable

As to the high court's order of repayment to the Fund, the GCB submitted that it was not competent in respect of the advocates who were struck off. ***The SCA agreed, holding that once the court had struck them off, its disciplinary powers over them were exhausted***. In respect of these powers, the Act provided that a court could permit a person to practise and also withdraw this permission by striking off or suspension. However, ***the Act was silent about the powers of a court to discipline practitioners while they enjoyed the right to practise***. In this regard, ***a court had an inherent power, and this permitted it to order repayment of moneys as a condition for further practice***. The SCA accordingly held that the high court had not misdirected itself in the exercise of its discretion to suspend the first group of advocates and dismissed the GCB's appeal.

As to the second group of advocates who appealed their striking off and orders of repayment, they did not contest the high court's findings on the facts or that they were not fit and proper to continue to practise. They contended that the high court had *erred in the exercise of its discretion as to whether to strike them off or to suspend them*. The SCA considered the reasoning and findings of the high court and concluded that the advocates had ***failed to establish a ground on which it could interfere with the decision***. Accordingly the advocates' appeals had to fail. However, the high court's orders that the advocates repay moneys to the Fund were set aside as the court did not have jurisdiction over them once they were disbarred.

- ***Schneider v AA*** (WCC, 2010): An expert witness comes to court to give the court the benefit of his expertise. ***The fact that the expert is called by a particular party because his opinion is in favour of that party's line of argument does not absolve the expert from his duty to provide the court with as objective and unbiased an opinion as possible***. ***An expert witness is not a hired gun who dispenses his expertise for the purposes of a particular case***. An expert witness does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess. In the present case, in which the issue before the court was whether it was appropriate for two young children to be home-schooled by their mother. A purported expert in home education, submitted an affidavit on behalf of the mother in which he made certain recommendations. He was the CEO of an organisation that promoted home education, and his affidavit reflected this fact. *What*

was never mentioned, however, was that the said organisation had actually funded the litigation. *It furthermore appeared that another expert witness was brought in as a hired gun, specifically to discredit the evidence of a third expert witness*. None of this was revealed to the court by the respondents' legal team. The court pointed out that ***cases dealing with best interests of children were serious matters***, and that ***the respondents' legal representatives owed the court a fiduciary responsibility even as they pursued the best interests of their clients***. In the present case the respondents' legal representatives ***failed in this duty by not informing the court of the true nature and objectives of the case***. The court accordingly resolved to submit a copy of its judgment to the Law Society of the Western Cape and to the Johannesburg Bar Council so as to enable them to investigate the conduct of respondents' attorney and advocate and to submit a full report to the court as to their conclusions.

- ***Motswai v RAF*** (GSJ, 2013): About a year after the plaintiff was injured in a motor vehicle accident a claim for R120 000 for 'soft tissue injuries' to his right ankle was submitted to the RAF, and a year later a high court summons for R390 000 was issued. The summons alleged that plaintiff had suffered 'severe' bodily injuries, including a fractured ankle, resulting in medical expenses (past and future) of R70 000; diminished earnings/earning capacity (R120 000); general damages (R200 000); and costs. This was ***despite the fact that hospital records indicated that he had suffered no more than a swollen ankle***. Both sides had incurred considerable costs in the course of preparing for trial, only for the matter to be settled on the trial date. When the presiding judge was presented with a settlement agreement in terms of which the RAF would be liable for (1) 80% of the plaintiff's damages; and (2) plaintiff's party – party costs on the high court scale, she objected to the terms of the agreement and the manner in which the litigation was conducted. She made the following points in this regard:
  - ***By appending their signatures to pleadings the attorneys vouched for their scrupulousness preparing the document***. *The plaintiff's attorney must, however, have realised from the outset that there was no 'serious injury' that would entitle plaintiff to compensation under the RAF Act and regulations*. Contrary averments in the particulars of claim were nothing but ***fabrications***, and the conduct of plaintiff's attorney in this regard amounted to ***dishonest litigation***.
  - The plaintiff was disqualified from compensation since there was never any serious injury, and there was thus no benefit due to him under the settlement agreement.
  - ***The litigation was conducted purely for the enrichment of his attorney and advocate, and the various medico-legal expert witnesses***.
  - The administrators and attorneys for the RAF were complicit in this by virtue of their failure to scrutinise the claim form and critically apply their minds to the content of the claim itself, being instead supine and content to proceed on the same road to legal and expert enrichment.
  - This case ***demonstrated how the road-accident compensation system was being systematically exploited by a predatory cabal of administrators, attorneys, advocates and professional experts, to the detriment of accident victims and taxpayers***.

  Pleadings should not be a fabrication, and legal practitioners have a duty to the court, not only to his client, and must not misrepresent facts to the court. A matter should not proceed to trial when it never should have done so, when there are truly no triable issues, and only if it is responsibly contestable.

  The judge directed that her judgment be forwarded to the Law Society of the Northern Provinces, the Bar Council, the chairperson of the RAF, the Minister of Transport, and the Health Professions Council of South Africa.
- ***De Lacy v SA Post Office*** (CC, 2011): The dispute arose from an award by the South African Post Office of a contract to provide an electronic pension and benefits payment service on behalf of the government of the North West Province to Kumo Consortium (Kumo), a competing tenderer. The *founding deposition levelled grave accusations against the SCA*. They named its judgment a *gross miscarriage of justice and attribute actual bias to the Court*. They charged that the judgment had not been delivered impartially and without favour or prejudice. The applicants added that at the hearing of the appeal, in their words, "[it] was patently obvious to anyone sitting in the appeal, as both the second applicant and I did, that Nugent JA had made up his mind to reverse Hartzenberg J's judgment, irrespective of the evidence and the facts and would do whatever was necessary to achieve this purpose." They accused the Court and Nugent JA in

particular of "deliberate" distortion of the facts and say that in no fewer than 114 separate instances it wilfully ignored or sought to interpret the evidence in a manner and to an extent inconsistent with the record. The applicants explained in their own words that the Supreme Court of Appeal, "for reasons best known to Nugent JA and at the instance of Nugent JA, decided to find against the applicants and in order to give effect to such decision, elected either to disregard the record for such purpose, or to apply interpretations to the record that are inconsistent with any reasonable understanding of the record."

An officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe that the allegations are untruthful or without a factual basis. This duty is ***heightened in circumstances where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality***. ***It behoves the legal representative concerned to examine carefully the complaints of judicial bias and dishonesty and the facts, if any, upon which the accusations rest***. Here it is doubtful whether these legal representatives did so. It was held that this is a matter which called for an enquiry by their respective professional bodies to which the applicants' attorneys and advocates belong. However, the Court ***declined the invitation to make the costs order de bonis propriis*** against these legal representatives. *An order of this nature would be justified where the conduct of a legal representative,* ***that is not attributable to a litigant****, calls for the court to express its displeasure*. This would be the case, for instance, where there is ***nothing to suggest that the litigant has actively associated himself with the conduct of the legal representative***. This could not be said of the applicants in this case. Both of them deposed to these utterly unfounded accusations of ulterior motive and judicial dishonesty. They actively pursued complaints before the JSC rehashing substantively the same accusations that they made in their affidavits before this Court. There was thus ***no reason to indemnify the applicants against an adverse and punitive costs order***. The conduct ***of the applicants' legal representatives may have to be dealt with by their respective professional bodies***. They should be requested to consider whether their conduct amounts to a breach of any ethical rule. To this extent, the Registrar was directed to furnish a copy of this judgment to the Society of Advocates, Johannesburg, and to the Law Society of the Northern Provinces.

General duty of counsel to be briefed by an attorney and not to do work normally performed by attorneys

Commentary

- Advocates work is based on ***referral*** – i.e. cannot be given directly to counsel by the client. Advocate does not deal directly with members of the public.
- ***Taking money directly from the public without a trust account is a criminal offence*** in terms of the Attorneys' Act.
- There are arguments for and against the advocates' profession being a referral profession:
  - *For*: It is essential for the advocates' profession to be a referral profession to ensure the proper administration of justice.
  - *Against*: It engenders a sense of elitism amongst members of the profession and the public alike.
- Certain work is attorneys' work and other work is advocates work. Advocates may not do attorneys work. What is the distinction between the two:
  - *Attorneys* – receiving documents; issuing notices; discovery affidavit (can advise on what is discoverable or not; or on evidence, but not to do the affidavit).
  - *Advocates* – forensic (to do with courts and litigation) work.
- *Duties of counsel in connection with briefs*: GCB rule 2.1 (duty of counsel to accept briefs), 2.2 (Cab Rank rule), 2.3 (Obligations with regard to appeals), 2.4 (Counsel shall give personal attention to all briefs), 2.5 (Holding briefs for another), 2.6 (When to refuse a brief), 2.7 (Counsel's involvement in costs), 2.8 (Settling a matter), 2.9 (Providing a signed pleading), 5.5 (briefs which could cause embarrassment), 5.6 (where briefing might be influenced), and rulings.

- The following are circumstances in which an advocate is ***entitled to take instructions from persons who are not attorneys***: *dock defences/presiding judge asks*; *pro Deo defences* and *criminal prosecutions*; various *special institutions*; where GCB determines that it is in public interest to do so.

Case law

- ***Society of Advocates v De Freitas*** (N, 1997): The applicant applied for the striking of the first respondent's name from the roll of advocates on the ground of unprofessional conduct in that ***he had accepted instructions directly from members of the public and represented clients in litigation without an attorney's instructions***. The second respondent, known as the Independent Association of Advocates of South Africa (or IAASA), of which the first respondent was a member, brought a counter-application for an order declaring that advocates, alternatively those who were members of IAASA, *had the right to accept instructions without the intervention of an attorney*. The first respondent argued that there was *nothing inherently improper, unethical or unprofessional about accepting instructions directly from the public*. In this regard he asserted that he was ***bound not by the rules of the applicant, of which he was not a member, but by those of IAASA, which allowed him to 'accept a brief or instructions (with or without the intervention of an attorney) from any client'***. He further argued that whatever the position in the High Court, ***advocates were authorised in terms of the Magistrates' Courts Act*** and the Rules made thereunder and to practise there without attorney's instructions.

  The Court delivered two unanimous judgments. In the first Thirion J dealt with the merits of the application and counter-application, while in the second Combrinck J dealt specifically with the question whether the Magistrates' Courts Act and Rules authorised advocates to appear in that court without having been briefed by an attorney.

  The practice that advocates do not take work off the streets without the intervention of an attorney came to South Africa from Holland and England, where the professions of the advocate and the attorney had been distinct since ancient times. The territories which became the Union of South Africa eventually ***all passed legislation separating the legal profession into two branches and prohibiting advocates from performing the functions of an attorney and vice versa***, which prohibitions were still extant in the Admission of Advocates Act and the Attorneys Act. It was a ***natural corollary of these statutory prohibitions that an advocate could not accept instructions in litigation without the intervention of an attorney***. The division of the profession was a ***longstanding, natural and practical one which had been uniformly observed in South Africa from 1937 until 1994***, when IAASA was formed. It ***left the attorney free to pursue the more practical side of the profession while allowing the advocate to practise his specialist forensic skills***. The ***abandonment of the rule that advocates may not take work from the street would lead to the erosion of the distinction between the professions***. Important also was the fact that ***while the Legislature in the Attorneys Act provided for the protection of a client against theft by the attorney of money held on his behalf by the attorney, there was no corresponding statutory provisions for the safeguarding of money held by an advocate on behalf of his client***. The Legislature's omission to make provision for the protection of moneys held by an advocate on behalf of his client was the direct consequence of the operation of the rule here in question. In addition, ***many High Court Rules had clearly been framed on the premise that whenever an advocate acted in proceedings in the High Court he would do so on instructions of an attorney***. ***Nor did the rule place an undue restriction on the advocate's right to freely exercise his calling. It was a reasonable restriction that was historically inherent in his practice and one which aspiring advocates foresaw and accepted in the interest and well-being of their profession***. Moreover, ***the argument that direct access to the advocate would be more cost effective lost sight of the fact that if he was going to perform work usually done by an attorney, he was going to charge for it***. ***The advocate operated more effectively and therefore more economically if he confined himself to the proper functions of the advocate***. Observance of the rule in question ***saves the advocate from the time-consuming duty of office administration and having to attend to the clerical side of the legal profession***. It leaves the advocate free to concentrate on what has always been the essence of the advocate's practice, namely, the giving of opinions and advice, pleading and conducting proceedings in court. The rule was one by which the relationship between advocates and attorneys had been regulated for a very long time and ***could as such not be dismissed as a mere household rule of the applicant***. It reflected a ***well-established practice***

on the strength of which Court procedure had been arranged and on the strength of which the Legislature had distinguished between the positions of advocate and attorney. It was ***reasonable and justifiable in the interests of the legal profession and the public and had to be sustained***. It was ***not***, as argued by respondents, ***affected by Rights of Appearance in Courts Act*** as the object of the Act was ***not*** to extend the existing rights of appearance of advocates, but *simply to state them in terms of an Act of Parliament*.

The Court held that ***disobedience of applicant's rule of conduct, which was but an embodiment of a long-standing rule of practice, was bound to lead to irregularities and abuses and had to be treated as unprofessional conduct*** justifying the exercise of the Court's disciplinary powers. The Court accordingly dismissed the counter-application. It found that the first respondent's conduct amounted to unprofessional conduct and it suspended him from practice for six months.

In respect of the argument regarding the position in the Magistrates' Court, it was held that the ***framers of the Magistrates' Courts Rules did not intend to do away with the division of work between attorneys and advocates*** by providing that an advocate should be entitled to do work that was essentially that of an attorney. ***The whole tenor of the Magistrates' Courts Act and the Rules promulgated thereunder showed that procedural matters were to be dealt with by attorneys and that the work of counsel was restricted to the drafting of pleadings and applications and appearances in court***.

- **NB**. The Court found that the referral rule is a rule based in the ***common law*** and is ***not just a rule of a voluntary society***. Therefore that De Freitas was bound by it irrespective of not being a member of the KZN Bar.
- ***De Freitas v Society of Advocates*** (SCA, 2001): A rule common to all constituent Bars of the General Council of the Bar of South Africa is that, with minor exceptions, ***members do not accept instructions from clients without the intervention of attorneys***. By contrast, the constitution of the second applicant, the Independent Association of Advocates of South Africa (IAASA), ***permits its members to accept instructions directly from the public***.

  It is trite that the Courts have ***inherent disciplinary powers over practitioners in cases of misconduct or unprofessional conduct***. Where the Courts are asked to interfere in cases where the conduct complained of falls outside the clear ambit of criminality, immorality or actual misconduct, ***it is for the Court to consider the propriety of the conduct proved and, if it is found to be unprofessional, what the penalty should be***. In so doing, it must take account of all the circumstances of the case with due regard to the demands of the proper administration of justice, and the interests of the profession and the public.

  The referral practice clearly ***serves the best interests of the profession and the public in litigious and non-litigious matters***. In litigious matters the benefits to the client are manifest: although some attorneys have the same academic qualifications as advocates, their ***practical schooling is different since it is aimed at the acquisition of special skills to do different types of work***. In general, ***advocates concentrate on the craft of forensic practice, while attorneys, with their more general skills, perform the administrative and preparatory work in litigation***. *Where an advocate is not briefed by an attorney he or she would either have to do the work which the attorney would otherwise have done or the client, at the very least, would require the advocate's guidance in these matters, matters of which the advocate him- or herself usually knows very little*. Furthermore, no attorney can specialise in every area of law. An ***attorney might also have so close or long-standing a relationship with a client, or be so involved with the detail of the client's case, as to be prevented from taking a sufficiently detached view***. ***Having access to the services of a corps of advocates who are, in principle, available to all, are able to offer expert legal advice and bring an independent view to bear is clearly in the interests of the client***.

  One obvious reason why an advocate should not perform the functions of an attorney is that, unlike attorneys, who in terms of the Attorneys Act are ***required to keep separate trust banking accounts and deposit therein money held or received on account of any person, advocates are not required to keep trust accounts***. Equally important is that in proper circumstances ***any shortfall in the trust account may be recovered from the Fidelity Fund***. A client who does not employ an attorney and *instructs an advocate directly enjoys no such protection*. Such a state of affairs is ***plainly not in the public interest***.

The adoption of the Constitution has not altered the position: the *right of an accused or detained person to engage a legal representative of his or her choice* entrenched by ss 25(1)(c) and 25(3)(e) ***does not mean the right to engage an advocate without the intervention of an attorney***. The *right freely to engage in economic activity and to pursue a livelihood* entrenched by s 26(1) does ***not mean that a trade, industry or profession cannot be regulated in a manner which does not in effect deny that right***.

Weighed as a matter of public interest against the benefits of the referral practice, the new right of appearance in Superior Courts afforded to attorneys by the Right of Appearance in Courts Act is ***not sufficient reason to do away with or alter the established practice***.

Cameron JA takes a more measured a ***much narrower*** approach than Hefer ADCJ. He notes that the ***crisis of legal services in South Africa is too acute, G and the threat this crisis represents to the administration of justice too grave, for the Courts to enforce tradition without there being compelling reason in the public interest for doing so***. A claim by a branch of the legal profession that a *professional rule or practice exists in the public interest and should, for that reason, be enforced by the Courts must be scrutinised to ensure that it is not loosely or over-broadly made*. Where a rule of professional practice is sourced in *statute*, any limitation of rights by that statute will have to *pass muster under the Constitution*. Where such a rule is not sourced in statute it would be subjected, if anything, to even more exacting constitutional scrutiny. While there is nothing intrinsically improper in a specialist corps of litigation-practitioners operating without the referral rule in its widest sense; nor, as experience in comparable jurisdictions shows, that sensible adjustments to the rule would be inimical to the continued flourishing of a such a corps, ***there is a very particular reason, namely the position with regard to trust accounts, for concluding that the 'proper position' for advocates in South Africa***, at least for the present, entails the enforcement of the referral rule since its disregard, if generally allowed, ***would lead to abuses in the future***. Advocates of necessity operate outside the statutory apparatus of s 79 of the Attorneys Act and cannot, by virtue of South Africa's trust laws, create trusts by unilateral declaration. ***A real and substantial danger to the public would result if advocates were permitted to handle public money, whether by dealing with their client's money or even taking deposits on fees in advance***. ***For so long as the absence of statutory trust fund protection continues, it provides a compelling reason for the courts to enforce the referral rule in the public interest***.

- ***General Council of the Bar v van der Spuy*** (T, 1999): In an application for the striking off of the respondent's name from the roll of advocates the Court found that the respondent had been guilty of professional misconduct in that (a) he had ***accepted instructions and fees directly from clients without the intervention of an attorney***; (b) he had ***allowed his address to be used for the service of papers or as the client's address for the purposes of litigation***; and (c) he had ***performed attorneys' work***. The respondent had been admitted as an advocate in 1950 and had been senior counsel since 1968. After being convicted of professional misconduct by the disciplinary subcommittee of one of the applicant's constituent Bars, he had *joined a voluntary association, the Independent Association of Advocates of South Africa (IAASA), as a founder member*. With regard to the question whether or not he was a fit and proper person to continue to practise as an advocate and whether he should be suspended from practice or whether his name should be struck from the roll, ***the respondent argued that he had reasonably believed, and still believed, that in terms of the law of South Africa he had been entitled to act in the manner he had***. It was submitted that the *belief was not unreasonable given the recent far-reaching changes in the law*. Furthermore, *the rules of conduct of IAASA specifically allowed the acceptance of briefs directly from members of the lay public without the intervention of attorneys*. He also submitted that there was no reason to doubt his bona fides and that none of the acts he had performed had brought the advocates' profession into disrepute.

  The Court held that ***as senior counsel of long standing, the respondent's belief that he had been entitled to act as he had done had been wholly unreasonable***. ***His reliance on the rules of conduct of the IAASA was wholly misleading in that, as a founder member and council member, he had been at least co-responsible for their formulation***. It was held that it would be unrealistically charitable to the respondent to say that the proceedings in the present matter had been conducted on a bona fide basis. Nor could his conduct be attributed to a mere misconstruction of the legal and ethical position. ***Moreover, his harping on the rights of the underprivileged to reduced costs of litigation (by not having to pay fees***

to both an attorney and an advocate) smacked of being sanctimonious in the light of his disciplinary conviction of unprofessional conduct for proposing a fee of R180 000 when a fee of R45 000 had been appropriate.

It was further held that the respondent's letter, published in a weekend newspaper had been an express attack on the advocates' profession couched in *belittling, insulting and extravagant terms*. His description of the profession as an outmoded legal order aimed at protecting an elite cartel by forcing the public to use attorneys to gain access to the 'heilige voorportale van die advokatuur' ***could only have served to malign the profession in the eyes of the public***. Although the papers showed that both the ambit and continued existence of the rule that advocates could not take direct instructions from lay clients were the subject of continued debate, it had been held by the Appellate Division in ***Beyers v Pretoria Balieraad*** that ***the rule existed, that advocates had to adhere to it*** and that ***those who did not were guilty of unprofessional*** conduct. In view of the fact that the respondent had displayed a *lack of the judgment required for the practice of an advocate*, rather than dishonesty, it was held that he should be suspended from practice for a period of six months.

- ***General Council of the Bar v Roseman*** (C, 2002): There is certain work which is properly within the ***exclusive ambit of the functions of the attorney*** who has been instructed by his client to act for him. Such work is usually done *best, and most cost-effectively, by the attorney or his clerk*. That is why it is usually done by the attorney, and not by counsel. ***That the advocate's profession is a referral profession has now been resoundingly repeated by the Supreme Court of Appeal*** in ***De Freitas v Society of Advocates of Natal***. The *advocate* is the ***specialist in forensic skills and in giving expert advice on legal matters***. The *attorney*, on the other hand, ***takes care of matters such as the investigation of the facts, the issuing and service of process, the discovery and inspection of documents, the procuring of evidence and the attendance of witnesses, the execution of judgments, and the like***. ***It is not proper for an attorney to shuffle off these functions onto the shoulders of an advocate by simply briefing the latter to attend to them on his own, nor can it be proper for counsel to accept such a brief***. There can, of course, be no objection to counsel being briefed to *advise* an attorney on how to deal with a specific problem which may have arisen in a particular matter; for example, in connection with discovery, or the service of process, or the execution of an order, or to assist an attorney in drafting a particular document, or to settle its terms. In such a case the *advocate advises or assists the attorney concerned so that the latter can better and more effectively perform the attorney's functions*, which remain, ultimately, the ***latter's responsibility***. That is a ***far cry from the situation where the attorney divests himself of those functions, as it were, washes his hands of them, and passes them over to the advocate to perform in his stead*** without any further active participation by the attorney. The mere fact that an advocate *had instructions* from an attorney to act as he did (in casu to perform the work of an attorney, i.e. ***signing and issuing summonses and notices of motion in the magistrate's court and furnishing an address for the service of process***) is ***insufficient*** to render his conduct proper. This is the case even if counsel is briefed to do *all that is required for a trial*.

  It was further held that the provisions of Rules 2(1), 6(2), 13(4)(a) and 52(1)(a) of the Magistrates' Courts Rules, read with the definition of 'practitioner' in s 1 of the Magistrates' Courts Act, ***do not entitle an advocate to do work that is essentially that of an attorney***. There is ***no basis for the proposition that it was the intention in those Rules to do away with the long-established division*** of work between attorneys and advocates. The respondent was held to be guilty of misconduct and was suspended for two months.

Fees, contingency fees and champerty

Contingency Fees Act and Uniform Rule of Professional Conduct 7.10

- *Contingency Fees Act*

  1 Definitions

  In this Act, unless the context otherwise indicates-

  'contingency fees agreement' means any agreement referred to in section 2 (1);

'day' means a court day;

'legal practitioner' means an attorney or an advocate;

'normal fees', in relation to work performed by a legal practitioner in connection with proceedings, means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement

'proceedings' means any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter; 'professional controlling body'-

(a) in respect of an attorney, means any body established by or under any law for the purposes of exercising control over the carrying on of the business of the attorneys' profession, and of which such an attorney is a member;

(b) in respect of an advocate, means any body which is determined by the Minister of Justice by notice in the Gazette for the purposes of this Act, and of which such an advocate is a member.

2 Contingency fees agreements

(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(2) Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

3 Form and content of contingency fees agreement

(1) (a) A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the Gazette, after consultation with the advocates' and attorneys' professions.

(b) The Minister of Justice shall cause a copy of the form referred to in paragraph (a) to be tabled in Parliament, before such form is put into operation.

(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.

(3) A contingency fees agreement shall state-

(a) the proceedings to which the agreement relates;

(b) that, before the agreement was entered into, the client-

(i) was advised of any other ways of financing the litigation and of their respective implications;

(ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;

(iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and

(iv) understood the meaning and purport of the agreement;

(c) what will be regarded by the parties to the agreement as constituting success or partial success;

(d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;

(e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;

(f) either the amounts payable or the method to be used in calculating the amounts payable;

(g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;

(h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and

(i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed.

4 Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating-

(a) the full terms of the settlement;

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;

(e) the reasons why the settlement is recommended;

(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and

(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating-

(a) that he or she was notified in writing of the terms of the settlement;

(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

(c) his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.

5 Client may claim review of agreement or fees

(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section.

(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust.

- *Uniform Rules of Professional Conduct 7.10*

7.10.1 Counsel acting on a contingency basis shall be obliged to comply with the Contingency Fees Act, 66 of 1997 ("the Act") and the prescribed agreement published in Government Gazette 20009 of 1999 dated 18 April 1999, Government Notice R547 together with any subsequent amendment or substitution of that agreement and a failure to do so will constitute a breach of these Rules.

7.10.2 The agreement as between the attorney and the client shall be counter-signed by counsel after having satisfied himself or herself that the agreement complies with the relevant provisions of section 2 and 3 of the Act.

7.10.3 The agreement shall explicitly state whether counsel elects to charge counsel's normal fees or a fee higher than normal fees as contemplated in section 2(1)(b) of the Act and in either event the agreement shall clearly state what the normal fees chargeable by counsel for the services to be rendered are or would be.

7.10.4 If counsel stipulates for a fee higher than counsel's normal fee than such higher fee shall be explicitly stated in the agreement and in no circumstances shall that higher fee exceed the normal fee charged by counsel by more than 100 percent.

7.10.5 The higher fee charged by counsel shall be taken together with the fees charged by the attorney for the purposes of applying the25 percent limit in the proviso to section 2(2) of the Act.

7.10.6 If either the attorney or counsel stipulates in the agreement for a fee higher than the normal fee, then the fees of both the counsel and attorney shall be brought to account when applying Rule 7.10.5 above notwithstanding that the other had elected in the agreement to charge normal fees. However, as between the attorney and counsel, the agreement may provide that any abatement of fees required upon the application of Rule 7.10.5 shall be borne only by the attorney or counsel who stipulated for a fee higher than normal.

7.10.7 Counsel shall ensure that the higher fee charged remains proportional to the endeavour and services rendered by counsel on behalf of the client. A mere delay in payment where little or no risk of failure exists will not entitle counsel to a significant enhancement of counsel's normal fees.

7.10.8 Where the circumstance which renders fees payable is the successful recovery of a money claim, then the contingency fee agreement shall make provision for what shall happen upon only partial recovery being achieved and the contingency fee agreement must provide a formula for abatement, if the fee is to be abated. The contingency fee agreement must further provide for the order of payment to counsel, the attorney and client upon recovery of the claim itself and costs.

7.10.9 In concluding a contingency fee agreement it shall be recorded whether the client is financially able to pay the fee before having received payment from the other party. In the event of a client who is unable to pay such fee in part or in whole, it is improper to stipulate that the fees are payable prior to receipt of payment from the other party of sufficient funds to discharge the client's obligation in respect of fees.

7.10.10 If a contingency fee agreement is concluded then counsel may stipulate as counsel's normal fee that it is 'such a fee as may be allowed on taxation' notwithstanding the provisions of Rule 7.2.4.

7.10.11 The contingency fee agreement shall provide that in the event that the client refuses to accept the advice of counsel then counsel may withdraw and if counsel withdraws for that reason or is otherwise obliged to withdraw for professional reasons, then the fees earned to date of withdrawal shall remain payable in the event of success.

7.10.12 If counsel takes over a brief from another counsel and there is a reasonable possibility that the prior counsel had concluded a contingency fee agreement, then in addition to counsel's obligations in terms of Rule 5.1.8, counsel shall be further obliged to inquire as to whether or not the prior counsel had acted in terms of a contingency fee agreement and shall not accept the brief unless adequate arrangements have been made to secure the payment of fees of the prior counsel upon success.

7.10.13 At the earliest reasonable opportunity after performance of any work in respect of which a fee may be raised, counsel shall mark the brief with the fee which may become payable in respect of such work under the contingency fee agreement. Save where circumstances arise which require an abatement of the fee in terms of the contingency fee agreement, such a fee may not be altered later than one month after it has been marked unless the consent of the Bar Council to make such alteration is obtained.

7.10.14 The provisions of Rule 7.1.5 shall not apply to fees payable in terms of a contingency fee agreement. Where the client is able to pay fees in part, irrespective of the outcome of the case, the contingency fee agreement may be concluded in terms which render its provisions applicable only to part of the fees payable in the case, provided that the extent of the client's non-contingent fee portion shall be stated in the contingency fee agreement.

Case law

- ***South African Association of Personal Injury Lawyers v Minister of Justice*** (GSJ, 2013): The applicant (SAAPIL) claimed that ***the common law entitled them to claim greater fees under contingency fee agreements with their clients than what was allowed under the Contingency Fees Act***, which limited contingency fees to double the legal practitioner's normal time-based fees or 25% of the settlement, whichever was lower. SAAPIL argued that ***the Act did not override the common law and that legal practitioners could therefore claim more than the Act allowed***, provided they acted ethically. In the alternative they argued that the Act was unconstitutional or partially unconstitutional.

  It was held that the so-called *'common-law' contingency fee agreements* between legal practitioners and their clients, ie agreements that allow legal practitioners to charge fees greater than those allowed by the Contingency Fees Act, were ***doubly unlawful***, since (1) ***the common law itself expressly prohibited contingency fee agreements between lawyers and their clients***; and (2) ***the Contingency Fees Act left no room for contingency fee agreements that did not specifically comply with its requirements***. There was also no room for the argument that the entire Act (or any part of it) was unconstitutional because it unfairly discriminated against legal practitioners or unjustifiably limited their rights by curbing the fees they were allowed to charge. For SAAPIL's constitutional challenge to succeed, it is required to demonstrate that there is no rational basis for differentiating between legal practitioners who enter into contingency fee agreements with their clients, on the one hand, and lay persons who enter into champerty agreements with other lay persons, on the other. SAAPIL's position ***overlooked the obvious and fundamental differences between legal practitioners who enter contingency fee agreements, on the one hand, and lay persons who enter into champerty and maintenance agreements, on the other***. There are four fundamental and overlapping differences. First, ***legal practitioners are responsible for conducting the litigation concerned***. They run the case and are responsible for advising on and taking the litigation decisions. *Lay persons who enter into champerty and maintenance agreements do not engage in any of these activities*. Second, *legal practitioners have* ***specialised knowledge and training which equip them to conduct litigation***. They are perceived by their clients as being experts on the decisions to be taken. This puts lawyers in a ***powerful position to influence the actual conduct of litigation***. Lay persons who enter into champerty and maintenance agreements do not possess any of these skills or characteristics. Third, legal practitioners are ***bound by a range of ethical duties to their clients***. These duties *may well come into conflict with their own pecuniary interest in the litigation when contingency fee agreements are concluded*. Lay persons who enter champerty and maintenance agreements have no such ethical or other duties. There is, therefore, *no possibility of a conflict of interest* in this regard. Lastly, legal practitioners are ***bound by a range of ethical duties to the court***. Lay persons who enter into champerty and maintenance agreements *owe no such ethical duties to the court or to litigants*. There is, therefore, no possibility of a conflict of interest in this regard. The application was dismissed. This decision was confirmed on appeal to the CC in ***Bobroff & Partners v De La Guerre***.

- ***General Council of the Bar v Geach*** (SCA, 2013): see above.
- ***PWC v National Potato Cooperative*** (SCA, 2004): The question which arose in this appeal was whether an alleged champertous agreement between the respondent co-operative (the plaintiff in the Court below) and a third party to *finance the respondent's action against a firm of accountants, the appellants (the defendants in the Court below) may be relied upon by the appellants as a defence to the respondent's claim*. The Court held that the fact that a litigant had entered into an unlawful agreement with a third party to provide funds to finance his case is a matter ***extraneous to the dispute between the litigant and the other party*** and was therefore *irrelevant to the issues arising in the dispute, whatever the cause of action*.

  An agreement in terms of which *a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action* was ***not contrary to public policy or void***. Such agreements, called *pacta de quota litis*, were known to Roman and Roman-Dutch law and have been looked upon with disfavour ever since the days of the Roman Empire. The reason for this was that they were considered to ***encourage speculative litigation*** and consequently amounted to an ***abuse of the legal process***. From the 19th century our law has often referred to such a contract as 'maintenance and champerty' and adopted some of the rules of English law without attempting to reconcile these rules with the principles of Roman-Dutch law. In English law, *maintenance and champerty are two distinct concepts*. *Maintenance* is the improper assistance by one person of litigation conducted by another, in which the former has no legitimate interest, without just cause or excuse. *Champerty* is an aggravated form of maintenance and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit. A number of cases decided in South Africa in the last years of the 19th and the early part of the 20th century show that the ***courts took an uncompromising view of agreements***, and ***refused to entertain litigation following on such agreements or to enforce them***. However, it is clear that the Courts ***acknowledged one exception***. It was accepted that ***if anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void***. Although the number of reported cases concerned with champertous agreements diminished, ***courts have still adhered to the view that generally they are unlawful and that litigation pursuant to such agreements should not be entertained***. After the South African Law Commission investigated and reported on the questionour Legislature followed the English example of permitting contingency fee arrangements - 'no win, no fees' and increased fees in case of success - but subject to strict controls. As in England this represented a watershed in public policy and was brought about by the view that it is in the public interest that litigants be able to take their justiciable disputes to court for adjudication. In the Court's view, it must be recognised that the civil justice system is ***strong enough to withstand the perceived abuses which could arise if civil litigation is made possible by financial support given by persons who provide such support in return for a share of the proceeds***. Accordingly it was held that ***an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy***. Even if it was contrary to public policy, the illegality of such an agreement or an attorney's contingency fee agreement would ***not*** be a defence in the action. However, ***litigation pursuant to such an agreement may constitute an abuse of the process that the Court may prevent in appropriate circumstances*** notwithstanding the right of access to the courts guaranteed by s 34 of the Constitution. An agreement in terms of which a person provides funds to enable a litigant to prosecute an action in return for a share of the proceeds ***may be relevant in the context of abuse of process***.

  In summary:

  - (1) ***an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void***;
  - (2) the ***illegality of such an agreement or an attorney's contingency fee agreement would not be a defence in the action***;
  - (3) litigation pursuant to such an agreement ***may constitute an abuse of the process*** which in appropriate circumstances a court may prevent notwithstanding a litigant's right of access to the courts enshrined in s 34 of the Constitution.

- ***Pelser v DPP*** (T, 2009): The applicant was the accused in a criminal trial pending before the High Court. The charges related to certain financial activities conducted by the accused or companies associated with him. ***There were various civil claims and subsequent judgments against the accused as well***. The accused ***applied for a permanent stay of the prosecution***, with the *applicant alleging that his constitutional rights to be presumed innocent had been violated; that their right to a fair trial, and their right of appeal or review in terms of s 35(3)(o) of the Constitution had been violated* ***by the pronouncements made in the civil judgments***. It was contended that he would therefore not receive a fair trial in the impending criminal case. It was further contended that the ***trial judge would be biased against the accused as a result of the pronouncements made by the various courts in the various civil cases***. The gist of these pronouncements was that the activities forming the substance of the indictment were fraudulent and unlawful.

  In effect, what the applicant contended was that, *once a civil case had been decided and certain findings made, a criminal prosecution in respect of the same conduct should not be allowed to proceed as the accused would be prejudiced by the prior civil court judgment against the accused*. The premise of the application was that *the trial judge would be influenced by the pronouncements in the various civil cases, and therefore fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality*. There was ***no basis for this***. It was trite law that ***decisions by the one court were not binding on the other court; they were mere opinions***. Furthermore, the standard of proof in criminal trials is higher than in civil trials. The criminal trial would be heard by a judge who was a ***trained judicial officer and he knew that he had to decide every case which came before him on the evidence adduced in that case***. He knew further that a ***decision on facts in one case was irrelevant in respect of any other case***, and that he had to confine himself to the evidence produced in the case he was actually trying.

  It was therefore held that the ***application was ill-conceived***. An accused person may not apply for a permanent stay of prosecution on the ground that he was likely to be prejudiced by external factors, in this case pronouncements in civil matters. Such an argument ***assumed that the trial court would commit an irregularity by allowing itself to be unduly influenced by those factors***. The trial should be allowed to proceed.

  It was further held that ***counsel for the applicant ought to be denied his entire fees in connection with the application***. Counsel had advised the applicant to initiate the application because he believed that the applicant's right to a fair trial had been violated by the pronouncements made in the various civil courts. ***The application was clearly baseless***. Furthermore, ***as counsel for the applicant was going to be paid by the Legal Aid Board, taxpayers' money should not be abused in this manner***. The application dismissed and an order was made that the applicant's counsel should not be entitled to payment of any fees in connection with the application.

- ***City of Cape Town v Arun Property Development*** (C, 2009): A judge in chambers ***dismissed*** the appellant's application for the review of the taxing master's allocatur of R37 500 in respect of senior counsel's fees in the preparation of and attendance to argue an opposed exception to the respondent's particulars of claim, and ordered that each party pay its own costs of the review. The composite fee allowed by the taxing master comprised senior counsel's fees for two days in court, at R15 000 per day, and a fee for a further five hours for preparation and drafting of heads of argument, at R1500 per hour. *The actual amount charged by counsel was R71 250*. The appellant appealed to the full bench of the same division of the High Court against the dismissal of the review of taxation. The appellant's principal submission was that ***the practice of allowing a composite fee on taxation of counsel's fees in an appeal was not a practice which was appropriate*** in the present matter. In the alternative, it was argued that, if a composite first-day fee was regarded as appropriate, ***the fee allowed should have been substantially higher than a refresher fee, and should have made provision for the reasonable time expended by counsel in drafting heads of argument and preparing for the hearing***.

  The taxing master had been obliged to exercise her discretion to allow, reduce or reject items in the bill of costs ***judicially***, that is, reasonably, justly and on the basis of sound principles. Even had she done so, ***a court would be entitled to interfere on review if the decision had been based on a misinterpretation of the law***, a ***misconception as to the facts*** and circumstances, or ***misunderstanding of court practice***.

It was correct for the purpose of taxing a party and party bill to ***take preparation and a refresher or day fee together for the purpose of assessing the reasonableness of counsel's fee***. It made no difference that the fee was charged for an exception rather than an appeal or application, or even a trial.

It was held that in ***determining the reasonableness or otherwise of counsel's fee for the purpose of the taxation of a party and party bill***, the taxing master was required to take into account, among other factors, the ***complexity of the matter***, the ***volume of the case***, the ***level of counsel's fees*** (the actual fees charged rendered as a globular sum), ***inflation*** and the fact that ***counsel had to be fairly compensated*** for preparation and presentation of argument.

It was held that the taxing master ought to have approached the taxation in the present matter along the following lines:

- (a) she ***ought to have given consideration to the importance of the matter***, its ***financial value*** to the parties and the ***complexity*** of the issues raised and/or required to be canvassed. In that regard, she ought to have had regard to the ***nature of the matter***, the ***issues*** in dispute, the ***volume*** of the record and such other factors as might have assisted her in obtaining an impression of the matter relevant to assessing its importance and complexity;
- (b) she ought to have given consideration to the ***work actually done*** by counsel and the ***rate*** at which he charged; and
- (c) she ought to have ***made an assessment of the reasonableness of counsel's fees***.

The taxing master had, in *allowing only five hours* for the drafting or settling of heads of argument, clearly ***not taken the appropriate considerations into account***. She ought, in view of the ***complexity*** of the matter and the ***volume*** of the case, have had regard to the ***time counsel had actually and productively spent on the matter***, and ***allowed substantially more than she did***. The appeal was upheld and the allocatur set aside and the matter referred back to the taxing master for fresh taxation.

The Court outlined the following ***point of clarification***: while the language of some of the cases may suggest that it is wrong or improper for ***counsel to charge separately for drafting heads of argument and preparation, this is not the case***. ***What is being conveyed is that it is not correct to tax a party and party bill on that basis***. The modern trend of charging a fee based on ***time actually expended is both acceptable and in the interest of transparency***.

To reiterate, in matters of this nature the Court would expect the taxing master in considering the question of counsel's fees to adopt an approach along the following lines:

- (a) consider the ***nature and complexity of the matter***: *What did the matter involve? How voluminous were the papers? Were there difficult areas of law involved or was the claim of particular importance to the parties by virtue, for example, of the amount of money involved? Did it involve an unusual amount of time spent in court?*
- (b) consider the ***work done by counsel***: *How difficult or complex were the matters dealt with in the heads of argument? How long did counsel spend drafting heads of argument? How long did counsel spend considering the opponent's heads of argument and authorities? How long did counsel spend preparing his or her oral address to court?*
- (c) ***consider counsel's fees***: *Do they fall within the parameters familiar to the taxing master? Is it clear what is being charged for? Are all the charges covered by the costs award made?*
- (d) consider what is ***reasonable***: In this regard the consideration that the *litigant must not be out of pocket in respect of party and party fees charged by counsel must be taken into account, together with the recognition that a reasonable rate coupled with reasonable time spent may not always, but certainly can, amount to a reasonable basis for the taxation of counsel's fees*. If the taxing master is of the *opinion that the time taken by counsel to perform a given task is reasonable on a party and party basis and the rate at which he or she charged is reasonable, then the litigant should be entitled to an indemnity in respect of such charges*.
- (e) consider the ***totality of the fee for the matter***: If the fee charged for the work done *prior to the hearing is reasonable and the work done qualifies as party and party attendances, then the fee for such attendances should be added to the fee for the 'refresher fee' charged*. By way of example, if in this

matter the taxing master determines that it was reasonable to spend 5 hours drafting or settling heads of argument, 5 hours reading and considering the respondent's heads of argument and authorities and 5 hours preparing for the oral argument, *she would allow a fee on exception of the equivalent of 2 days and 15 hours*. *If she felt an excessive amount of time was spent on items of preparation, she should disallow a fee for such excessive time*.

- ***Hennie de Beer Game Lodge v Waterbok Bosveld Plaas*** (CC, 2010): The applicant's earlier application to the Constitutional Court had been dismissed, and this had attracted a costs order against it. The applicant objected to fees allowed by the taxing master pursuant to the costs order, and took the taxation on review, ***disputing the fees allowed to counsel in respect of the drafting of an affidavit resisting applicant's failed application***. It argued that most of the substance of the affidavit had been *ventilated in previous rounds of the litigation and that the fees were excessive and exorbitant*. In essence the applicant's complaint was that the same facts and arguments presented themselves during all the preceding court proceedings in which counsel was involved, rendering the hours allowed for the affidavit unreasonable.

  The Court referred to the general principles guiding the review of a taxation, as set out in ***President of the Republic of South Africa v Gauteng Lions Rugby Union***:

  - (a) costs are awarded to a successful party to ***indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation***;
  - (b) ***moderating balance must be struck which affords the innocent party adequate indemnification***, ***but within reasonable bounds***;
  - (c) the taxing master must ***strike this equitable balance correctly in the light of all the circumstances of the case***;
  - (d) an ***overall balance between the interests of the parties should be maintained***;
  - (e) the taxing master should be guided by the general precept that the ***fees allowed constitute reasonable remuneration for necessary work properly done***;
  - (f) the ***court will not interfere*** with a ruling made by the taxing master ***merely because its view differs from his***, but ***only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling***.

  The Court added that to his it should be ***added***:

  - (g) ***the principle that time charged was not decisive in determining the reasonableness, between party and party***, of a fee for that work, the reason being ***that time alone would put a premium on slow and inefficient work and would be conducive to the charging of fees wholly out of proportion to the value of services rendered***.

  The taxing master had erred in allowing counsel 61 hours for drafting an affidavit that was, in its greatest part, *a rehearsal of issues that had been well traversed in previous court proceedings*. A competent professional, acquainted with the issues, as counsel would have been in this case, would have required no more than 20 hours for the task.

  Taxation was to afford ***reasonable remuneration for work necessarily and properly done***. The taxing master's failure to find the correct and equitable balance warranted the court's intervention. In determining reasonable remuneration for counsel, ***the court was in a better position than the taxing master to assess what went into the affidavit*** and, given that the sole dispute was the amount of hours charged, it was ***appropriate for the court to finalise the disputed bill itself without remitting it to the taxing master***. The relevant items of the taxing master's allocatur were set aside and 61 hours replaced with 20 hours.